No. 98-6322-CFH Title: Antonio Tonton Slack, Petitioner
v.
Eldon McDaniel, Warden, et al.

Docketed: October 6, 1998 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Oct 5 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 5, 1998)
	Oct 30 1998	Waiver of right of respondents Eldon McDaniel, Warden, et al. to respond filed.
	Nov 5 1998	DISTRIBUTED. November 25, 1998
	Nov 12 1998	Response requested.
	Dec 10 1998	Brief of respondents Eldon McDaniel, Warden, et al. in opposition filed.
	Dec 16 1998	Reply brief of petitioner Antonio T. Slack filed.
	Dec 31 1998	REDISTRIBUTED. January 15, 1999
	Jan 19 1999	REDISTRIBUTED. January 22, 1999
	Feb 12 1999	REDISTRIBUTED. February 19, 1999
	Feb 22 1999	Petition GRANTED. limited to the following question: If a person's petition for habeas corpus under 28 U. S. C. Sec. 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the Sec. 2254 petition, are claims included within that petition that were not included within his initial Sec. 2254 filing "second or successive" habeas applications? SET FOR ARGUMENT October 4, 1999. **********
	Mar 10 1999	Motion of petitioner for appointment of counsel filed.
	Mar 29 1999	DISTRIBUTED. April 2, 1999 (Page 16)
	Apr 1 1999	Joint appendix filed.
	Apr 2 1999	Order extending time to file brief of petitioner on the merits until April 22, 1999.
	Apr 5 1999	Motion for appointment of counsel GRANTED and it is ordered that Michael Pescetta, Esquire, of Las Vegas, Nevada, is appointed to serve as counsel for the petitioner in this case.
	Apr 21 1999	Brief amicus curiae of Rutherford Institute filed.
	Apr 22 1999	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Apr 22 1999	Brief of petitioner Antonio T. Slack filed.
	May 11 1999	Order extending time for filing resondents' brief on the merits to and including June 21, 1999.
	Jun 21 1999	Brief of respondents Eldon McDaniel, Warden, et al. filed.
	Jun 21 1999	Brief amici curiae of California, et al. filed.
	Jul 20 1999	Application (99A86) to extend time to file petitioner's reply brief on the merits, submitted to Justice O'Connor.
	Jul 22 1999	Application (99A86) granted by Justice O'Connor extending the time to file until August 2, 1999.
	Aug 2 1999	Reply brief of petitioner Antonio T. Slack filed.

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No. 98-6322-CFH

Entry	Date	Proceedings and Orders
	Aug 13 1999	CIRCULATED.
	Oct 4 1999	ARGUED.

No. _____ 98-6322

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANTONIO TONTON SLACK, Petitioner

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA, Respondents.

Supreme Court, U.S.
FILED
OCT 5 1998
OFFICE OF THE CLERK

PETITION FOR WRIT OF CERTIORARI

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93 pp

ANTONIO TONTON SLACK, Petitioner

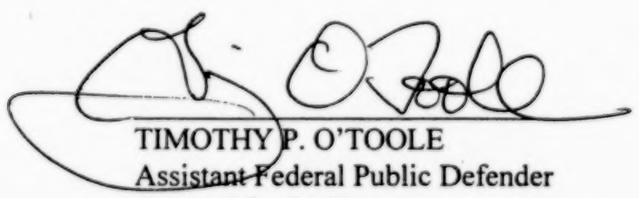
v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA, Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Antonio Tonton Slack, asks for leave to file the attached petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in the District Court. No affidavit is attached, inasmuch as the District Court appointed counsel for petitioner under the Criminal Justice Act of 1964.

Respectfully submitted,



TIMOTHY P. O'TOOLE
Assistant Federal Public Defender
Counsel for Petitioner

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98-6322
Slack
v.
McDaniel

I.

ISSUE PRESENTED

A. Should this Court grant certiorari, vacate the judgment and remand for further proceedings, in a case where the lower courts held that a habeas corpus petition filed following a previous dismissal without prejudice for lack of exhaustion constituted an abusive "second or successive petition" but did not consider this Court's contrary holding in its intervening decision in Stewart v. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998)?

B. Should this Court grant plenary review to resolve the split of authority among the United States Courts of Appeals regarding whether the provisions of Rule 9(b) of the Rules Governing Section 2254 Cases, which governed the filing of "second or successive petitions" prior to the passage of the Anti-Terrorism and Effective Death Penalty Act, may be properly applied to a petition filed after a previous petition had been dismissed without prejudice for exhaustion, so that the doctrine of abuse of the writ is being invoked before completion of the "first full round" of habeas corpus proceedings?

II.

PARTIES TO THE PROCEEDINGS

There are no parties to this proceeding other than those listed in the caption.

III.

OPINION BELOW

The memorandum decision and order of the United States District Court is unpublished. App. 1. The order of the United States Court of Appeals for the Ninth Circuit denying Mr. Slack's request for a certificate of probable cause to appeal is also unpublished. App. 2.[1]

IV.

BASIS FOR JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Mr. Slack's request for a certificate of probable cause to appeal was filed on July 7, 1998. Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1). See Hohn v. United States, __ U.S. __, 118 S.Ct. 1969, 1978 (1998) ("this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability").

V.

COURT RULES INVOLVED

Rule 9(b) of the Rules Governing Section 2254 Cases provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those

[1] There are no parties to this matter other than those named in the caption.

grounds in a prior petition constituted an abuse of the writ."

VI.

STATEMENT OF THE CASE

A. The Judgment of Conviction And Direct Appeal.

In 1989, the State of Nevada charged 19-year-old petitioner Antonio Tonton Slack with First Degree Murder in connection with the shooting death of Alanna Holmes. At trial, Mr. Slack admitted to having shot Ms. Holmes but asserted that the killing was accidental. On May 16, 1990, a jury convicted Mr. Slack of Second Degree Murder. The state trial court sentenced Mr. Slack to life in the Nevada State Prison for the Second Degree Murder, and imposed a consecutive life sentence because Mr. Slack used a deadly weapon in connection with the killing. App. 3.

Mr. Slack pursued a timely direct appeal to the Nevada Supreme Court. On appeal, Mr. Slack's court-appointed counsel:

(1) Challenged the sufficiency of the evidence to support the conviction;
(2) Argued that the trial court had improperly allowed the jury to hear prejudicial evidence regarding his alleged sexual relationship with the underaged victim;
(3) Asserted that the Nevada reasonable doubt instruction was unconstitutional; and
(4) Challenged the standard Nevada premeditation instruction.

On November 5, 1991, the Nevada Supreme Court dismissed Mr. Slack's appeal. App. 4.

B. Mr. Slack's Proper Person Federal Habeas Corpus Proceeding Is Dismissed Without Prejudice Less Than Three Months After It is Filed.

On November 27, 1991, Mr. Slack filed a petition for writ of habeas corpus in the United States District Court for the District of Nevada. The proper person petition raised the same federal constitutional issues that Mr. Slack originally raised in his brief to the Nevada Supreme

Court. App. 5. On December 10, 1991, the United States District Court ordered the State of Nevada to file a response addressing "the merits of the petition." App. 6. After the State of Nevada obtained an extension of time to answer, however, Mr. Slack moved to stay the proceedings "pursuant to Rose v. Lundy, 455 U.S. 509 (1982)," so that he could pursue unexhausted claims. On February 19, 1992, the district court instead dismissed the petition "without prejudice" and granted Mr. Slack leave "to file an application to renew upon exhaustion of all State remedies." App. 7.

C. Mr. Slack's Returns To State Court, Where His Proper Person State Post-Conviction Proceedings Are Dismissed Without The Appointment of Counsel And Without The Benefit of An Evidentiary Hearing.

On July 10, 1992, Mr. Slack, again acting in proper person, filed a Post-Conviction Petition for Writ of Habeas Corpus in the Nevada state trial court. Among other things, Mr. Slack alleged that he had been denied his Sixth and Fourteenth Amendment rights to the effective assistance of trial and appellate counsel, and made a number of factual averments supporting this claim. Without appointing counsel, the state trial court summarily denied the petition. App. 8.

On February 1, 1993, Mr. Slack filed a timely notice of appeal. On December 30, 1993, without appointing counsel and without any briefing, the Nevada Supreme Court dismissed the appeal, ruling that Mr. Slack's claims were "repelled by the record," and concluding that briefing and oral argument were unwarranted. App. 9.

D. Mr. Slack Returns To Federal Court, Where Counsel Is Appointed And Raises All Known Exhausted Claims And All Unexhausted Claims Which Might Be A Basis For Granting Relief From Petitioner's Conviction And Sentence.

On March 27, 1995, Mr. Slack returned in proper person to the United States District Court and filed an amended petition for writ of habeas corpus. App. 10. On June 1, 1995, Mr. Slack moved for the appointment of counsel. App. 11. The State of Nevada opposed the motion, urging

the court not to "waste scarce judicial resources." App.24. On February 29, 1996, the district court denied Mr. Slack's motion for the appointment of counsel. App. 12.

After the State filed additional procedural motions seeking a more definite statement and seeking to dismiss for lack of factual exhaustion, on December 31, 1996, Mr. Slack renewed his request for the appointment of counsel. App. 13. The State of Nevada again opposed the motion.

On February 13, 1997, the district court concluded that "it appears to be in the best interest of justice that counsel be appointed to represent petitioner herein." App. 14. The district court appointed the Federal Public Defender to represent Mr. Slack, and directed counsel to "discuss and explore with petitioner, as fully as possible, the potential grounds for habeas corpus relief in Petitioner's case . . . advise petitioner that all possible grounds for habeas corpus should be raised at this time, and that failure to do so may result in loss of the omitted grounds under the rules regarding abuse of the writ." App. 14. The Court allowed counsel time to review the file and amend the petition. App. 14.

On December 24, 1997, counsel for Mr. Slack filed an Amended Petition For Writ of Habeas Corpus, which is the operative pleading in this case. App. 15. The Petition alleges seven federal constitutional grounds for relief:

(1) Insufficient evidence to support the conviction;
(2) Insufficient notice provided by the charging document;
(3) Improper introduction of evidence of Mr. Slack's sexual relationship with the victim;
(4) Failure of the trial court to properly instruct the jury on reasonable doubt, premeditation and deliberation, and malice aforethought;
(5) Ineffective assistance of trial counsel through
    (a) Failure to take steps to prevent the introduction of sexual misconduct evidence;
    (b) Failure to object to improper jury instructions;

and

(c) Failure to develop the facts of the case and present available defenses.

(6) Ineffective assistance of appellate counsel; and

(7) Cumulative error,

Counsel acknowledged that issues 2 and 4(c) had not yet been presented to the state courts. App. 15.

E. The District Court Dismisses Most Of Mr. Slack's Claims As "Abusive" Under Rule 9(b), Even Though The Instant Proceedings Cannot Constitute "Second Or Successive" Proceedings Because Mr. Slack has Never Completed His First Round of Federal Habeas Corpus Review, And Mr. Slack Is Not Allowed To Appeal This Ruling.

On December 28, 1997, the State moved to dismiss based on the lack of complete exhaustion. See Rose v. Lundy, 455 U.S. 509, 510 (1982). App. 16. The State further argued that because Mr. Slack had returned to state court without exhausting grounds 2, 4(c), 6 and 7, those claims were subject to the standards that govern "second or successive" petitions under Rule 9(b) of the Rules that Govern Section 2254 cases. See Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996) (App. 23). According to the State, by noting Mr. Slack's prior writ history and pleading abuse of the writ, it had shifted the burden to Mr. Slack to demonstrate "cause and prejudice" under McCleskey v. Zant, 499 U.S. 467 (1991). Absent such a showing, the State asserted, the district court was compelled to dismiss claims 2, 4(c), 6 and 7 as abusive. App. 16.

In response, Mr. Slack argued that the substance of most of the claims in the petition had already been fairly presented to the state courts and thus met the exhaustion requirement. App. 17. Mr. Slack further asserted that even if any of his claims were deemed unexhausted, those claims could not be barred as abusive because (1) He had not completed a first round of federal habeas and in fact had never received a prior adjudication of his claims; and (2) Any unexhausted claims could

not be deemed "abusive" under Rule 9(b) or under Farmer because they had not been deliberately withheld. App. 17.

On March 11, 1998, the district court entered an order concluding that because Mr. Slack had not raised Claims 2, 4(c), 5, 6 and 7 in his previous petition, those claims were presumptively abusive under Rule 9(b) and under McCleskey. The district court accordingly directed Mr. Slack "to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds 2, 4(c), 5, 6 & 7 of the instant amended habeas petition." App. 18. The court's order explained that the only way Mr. Slack could overcome a finding of abuse was to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice" -- the standard McCleskey applies to "second or successive" petitions. App. 18.

On March 26, 1998, Mr. Slack filed a motion for reconsideration of the district court's order. In that motion, Mr. Slack asserted that no finding of abuse of the writ was possible because the amended petition did not constitute a "second or successive" one within the meaning of Rule 9(b). Mr. Slack accordingly argued that the court could not find Rule 9(b) abuse. App. 19.

On March 31, 1998, the district court entered an order dismissing Mr. Slack's petition. App. 1. The lower court concluded that grounds 2, 4(c), 5, 6 & 7 were abusive under Rule 9(b), Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996) and McCleskey v. Zant, 499 U.S. 467 (1991). The court thus dismissed those claims with prejudice. The district court further concluded that Claim 3 was unexhausted, and dismissed the remainder of the claims without prejudice pursuant to Rose v. Lundy. App. 1.

On April 29, 1998, Mr. Slack filed a timely notice of appeal. App. 20. On May 11, 1998, Mr. Slack filed an application for a certificate of probable cause to appeal, arguing that it was at least

debatable among jurists of reason whether the lower court erred regarding its dismissal of Claims 2, 4(c), 5, 6 & 7 as abusive. App. 21. Specifically, Mr. Slack explained that debatable issues existed (1) with regard to whether his amended petition constituted a "second or successive" one under Rule 9(b), (2) with regard to whether the lower court properly applied the abuse of the writ standard under these facts, where there was no showing that he had deliberately withheld any of the claims; and (3) with regard to whether the lower court properly determined that claim 3 was unexhausted. App. 21.

On May 19, 1998, the district court denied Mr. Slack's application for a certificate of probable cause to appeal. App. 22. On July 7, 1998, a two-judge panel of the United States Court of Appeals for the Ninth Circuit summarily denied Mr. Slack's request for a certificate of probable cause. App. 2.

VII.

REASONS WHY THE WRIT SHOULD BE GRANTED

What should not be lost amidst the procedural history of this case is this simple reality: Mr. Slack has never received an adjudication by the federal courts of any of his claims, and yet, the lower courts have ruled that his initial, uncounseled foray into federal court -- which lasted less than 3 months, and which was expressly dismissed "without prejudice" to allow for exhaustion -- has essentially foreclosed him from raising all available claims during this initial round of federal habeas proceedings. The lower courts' ruling substantially departs from the spirit of Rule 9(b) and the language of McCleskey v. Zant, 499 U.S. 467 (1991), which established strict abuse of the writ standards for successive petitions, under the express theory that a petitioner had already received a full and fair round of habeas corpus adjudication.

The basis for this eccentric ruling preventing Mr. Slack from litigating his claims in federal

court traces directly to Farmer v. McDaniel, 98 F.3d 1548, 1555-57 (9th Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 1474 (1997), where a divided panel of the Ninth Circuit ruled that a petition can properly be labeled "second or successive" -- and therefore abusive under Rule 9(b) -- even though all previous petitions had been dismissed "without prejudice" for lack of complete exhaustion.

The erroneous and unsupportable nature of the holding in Farmer (and the consequent ruling below) has now become indisputable in light of Chief Justice Rehnquist's recent majority opinion in Stewart v. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998). There, this Court explained that, under 28 U.S.C. § 2244(b) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a "second or successive" petition is a legal term of art with a longstanding application in pre-Act case law, and held that a petition filed after previous petitions have been dismissed without prejudice on technical grounds, including the ground of non-exhaustion, is not "second or successive." This decision abrogates the rule of Farmer, upon which the lower courts based their rulings in this case. Because the lower courts did not have the benefit of Martinez-Villareal when they issued their rulings in this case, this Court should grant the petition, vacate the judgment below, and remand for further proceedings in light of Martinez-Villareal.

Alternatively, this Court should grant plenary review to resolve the split of authority among the United States Courts of Appeals regarding whether the provisions of Rule 9(b) governing "second or successive" petitions may properly be invoked even though the petitioner has never received a "first full round" of habeas corpus proceedings. To petitioner's knowledge, no other appellate court has so held. At least three Courts of Appeals squarely disagree with Farmer (and the consequent decision here), instead holding that a petition cannot, as a matter of law, trigger abuse-of-

the-writ analysis under Rule 9(b) unless a prior petition has already been adjudicated.[2] Every Court of Appeals has held that the same "second or successive" language contained in the AEDPA excludes from its definition petitions filed after a federal court dismissed a prior petition without prejudice for exhaustion.[3]

In fact, even the Ninth Circuit has held, in an opinion issued just three months after the decision in Farmer, that a petition filed after a previous petition has been dismissed for lack of exhaustion is not "second or successive" under the AEDPA. In re Turner, 101 F.3d 1323 (9th Cir. 1997). The ruling below accordingly creates an extremely anomalous and confusing scenario within the Ninth Circuit: As the law in that Circuit now stands, a litigant who has had previous petitions dismissed for exhaustion and who returns to federal court after the effective date of the AEDPA is clearly entitled to have his claims adjudicated under the same standards as those that would govern in any first petition, whereas a litigant like Mr. Slack, whose case is governed by the supposedly more lenient pre-AEDPA standards can, under Farmer, have his claims dismissed as abusive pursuant to Rule 9(b) despite never having completed any round of federal habeas review.

In short, the lower courts' rulings in this case, especially in combination with the Farmer decision, conflict with those in other courts of appeals, and create a great potential for confusion and unfairness. Because the issue presented by this petition is currently the subject of debate among judges in the various circuits, it was not only worthy of the Court of Appeals' attention, Lozada v. Deeds, 498 U.S. 430 (1991) (courts of appeals should grant certificates of appealability as to issues that debatable among reasonable jurists); Barefoot v. Estelle, 463 U.S. 880, 892-93 (1983) (same), it is worthy of consideration by this Court as well. See Supreme Court Rule 10(a).

[2] E.g., Dellenbach v. Hanks, 76 F.3d 820, 822 (7th Cir. 1996); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir. 1990); Woods v. Whitley, 933 F.3d 321, 322 (5th Cir. 1991).

[3] E.g., Carlson v. Pitcher, 137 F.3d 416, 420 (6th Cir. 1998); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997).

A. This Court Should Grant the Petition, Vacate the Judgment and Remand for Further Proceedings, Where the Lower Courts Did Not Consider this Court's Intervening Decision in Stewart V. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998), Which Completely Undermines the Analytical Basis for the Lower Courts' Orders in this Case.

As noted, the lower court relied on Farmer v. McDaniel, 98 F.3d 1548, 1555-57 (9th Cir. 1996) to support dismissal of most claims in Mr. Slack's petition, even though Mr. Slack's previous federal petition was dismissed for lack of exhaustion. The district court and the court of appeals then summarily denied permission to appeal. Because the lower courts did not have the benefit of this Court's decision in Stewart v. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998), and because the lower court rulings cannot withstand scrutiny under the standards used in that decision, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of Martinez-Villareal.

This Court's power to GVR in light of an intervening decision of this Court is well-established:

> [T]he GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent judges. We have GVR'd in light of a wide range of developments, including our own decisions . . . .

Lawrence v. Chater, 516 U.S. 163, 166-67 (1996).

As this Court has explained:

> In an appropriate case, a GVR order conserves the scarce resources

> of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues . . . ."

Id. at 167. For this reason, where "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests on a premise that the lower court would reject if given the opportunity for further consideration . . . a GVR order is, we believe, potentially appropriate." Id. at 167; accord Stutson v. United States, 516 U.S. 193 (1996) (relying on GVR standards of Lawrence and emphasizing the importance in criminal cases of ensuring that the lower courts considered this Court's authority when they issued their rulings).

The GVR standards could have been written with this case in mind. Here, there can be no dispute that the lower court decisions were rendered without the benefit of this Court's decision in Martinez-Villareal. That decision was entered on May 18, 1998, almost 45 days after the district court entered judgment, almost three weeks after Mr. Slack filed his notice of appeal, and the day before the district court denied Mr. Slack's application for a certificate of probable cause. The district court does not mention Martinez-Villareal in any of its orders, and there is no reason to believe that the Court of Appeals considered the ruling either, since it does not mention the case in its one-sentence order denying Mr. Slack's request for a probable cause certificate.

It is, moreover, reasonably probable that the Court of Appeals will reconsider its ruling if given the opportunity. The Ninth Circuit's ruling, like the district court's ruling, rests on a determination that the term "second or successive petition," as set forth in Rule 9(b) of the Rules

That Govern Section 2254 Cases,[4] includes a petition filed after an earlier petition has been dismissed without prejudice due to the lack of complete exhaustion.

As the Court of Appeals explained in Farmer,

> [Petitioner] says that Rule 9(b)'s reference to "second or successive petition" incorporates the concept of a prior merits determination into both clauses . . .Given how [the rule] is actually written, [however], we cannot say that Rule 9(b) itself requires that the prior petition be one that was resolved on the merits.

Farmer, 98 F.3d at 1555.

Reasonable jurists not only could conclude, they in fact would be bound to conclude, that this holding cannot logically survive this Court's analysis in Stewart v. Martinez-Villareal. The habeas petitioner there had filed three petitions for habeas corpus relief prior to 1993, all of which were dismissed due to lack of complete exhaustion. Mr. Martinez-Villareal then filed a fourth federal petition in 1993, which included a claim of incompetence to be executed under Ford v. Wainwright, 477 U.S. 399 (1986), which was dismissed for lack of ripeness. Both the lower court and the court of appeals adjudicated the remainder of the petition. See Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir. 1996).

After enactment of the AEDPA, Mr. Martinez-Villareal moved to reopen litigation of the incompetence-to-be executed claim. The Court of Appeals held that such a petition was not a "second or successive" one within the meaning of 28 U.S.C. § 2244(b)(3)(A). Martinez-Villareal v. Stewart, 118 F.3d 628, 632-33 (9th Cir. 1998)(per curiam).

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[4] Rule 9(b) provides: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

This Court affirmed. According to Chief Justice Rehnquist's majority opinion, the new petition containing the Ford claim did not constitute a "second or successive" application for relief. The Court analyzed that question as controlled by its precedents dealing with the exhaustion defense:

> None of our cases expounding this [exhaustion] doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

Id. at 1622.

There is no way to reconcile this holding with the rulings of the courts below. Despite the fact that Mr. Martinez-Villareal had filed three previous petitions -- and returned to state court several times to exhaust -- this Court squarely held that his claims were governed by the standards that applied during the "first round" of federal habeas proceedings because his later petitions were not "second or successive." By contrast, before his lawyer filed the operative petition in this case, Petitioner Slack had filed single federal petition in proper person, which was dismissed "without prejudice" for exhaustion after pending for less than three months. The instant petition was Mr. Slack's first post-conviction petition -- state or federal -- prepared by counsel. Unlike Mr. Martinez--Villareal, who, before this Court's opinion last term, had received adjudication of many of his other claims on the merits -- Mr. Slack has never had **any** federal court address any of his claims no court has even been presented with a single claim prepared by counsel before the filing of the instant petition. And yet, the lower courts attached momentous and unfair consequences to the mere filing of an earlier petition, holding that Mr. Slack's new petition was "successive," and refusing to adjudicate Mr. Slack's claims "under the same standard as would govern those made in any other

first petition." Instead, they used the restrictive standards this Court announced in McCleskey for the adjudication of successive petitions.

That result is fundamentally irreconcilable with Martinez-Villareal. Because the lower courts' rulings were made without the benefit of this Court's ruling in Martinez-Villareal, and because, absent action by this Court, Mr. Slack will have been treated in a fundamentally unequal and discriminatory manner, this Court should grant the petition, vacate the judgment, and remand for further proceedings.

B. If It Does Not Summarily Remand This Matter To The Court of Appeals, This Court Should Grant Plenary Review to Resolve the Split of Authority among the United States Courts of Appeals Regarding Whether the Provisions of Rule 9(b) Governing "Second or Successive" Petitions May Be Properly Invoked Prior to the Completion of the "First Full Round" of Habeas Corpus Proceedings.

If this Court determines that a remand for reconsideration in light of Martinez-Villareal is inappropriate, this Court should grant plenary review to address whether the provisions of Rule 9(b) may properly be invoked prior to the completion of the "first full round" of federal habeas corpus proceedings. The Ninth Circuit's ruling in this case, as well as its prior decision in Farmer, have created a split among the circuits, which warrants this Court's corrective intervention. See Supreme Court Rule 10(a).

As noted, both Farmer and the decision below hold that a "second or successive petition" under Rule 9(b) may include one filed after an earlier petition had been dismissed without prejudice due to lack of complete exhaustion. Mr. Slack was unable to find a single opinion agreeing with that position: at least three other circuits have resolved the issue in a directly contrary fashion. E.g., Dellenbach v. Hanks, 76 F.3d 820, 822 (7th Cir. 1996) (per Posner, C.J.) (petition filed after two

earlier ones dismissed for lack of exhaustion did not trigger abuse of the writ doctrine; "it is not an abuse to file a successive petition if the previous petition or petitions were not denied on the merits."); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir. 1990) ("the district court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition"); Woods v. Whitley, 933 F.3d 321, 322 (5th Cir. 1991) (same).

Consistent with the longstanding principle that terms retain their legal definition even when the law changes, Bradley v. United States, 410 U.S. 605, 609 (1973), all of the circuits (including the Ninth) that have considered the meaning of the term "second or successive petition" under the AEDPA have likewise concluded that a petition filed after an earlier petition had been dismissed for lack of complete exhaustion is not a "second or successive petition." [5]

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[5] E.g., In re Wilson, 142 F.3d 939, 940 (6th Cir. 1998) ("this court joined every other court to consider the question and held that a habeas petition filed after a previous petition was dismissed without prejudice for failure to exhaust state court remedies is not a 'second or successive' petition"); McWilliams v. State of Colorado, 121 F.3d 573, 575 (10th Cir. 1997) ("[w]e instead accept the view espoused by every circuit that has considered this issue since enactment of the Antiterrorism and Effective Death Penalty Act: a habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of § 2244(b)(1)."") (citations omitted); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997) (agreeing with "the First, Second, Seventh, and Ninth Circuits," and holding, that a habeas petition filed after dismissal without prejudice for failure to exhaust is not a "second or successive" petition); Christy v. Horn, 115 F.3d 201,208 (3d Cir. 1997) ("We hold that when a prior petition has been dismissed without prejudice for failure to exhaust state remedies ... the petitioner may file his petition in the district court as if it were the first such filing."); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996) (rejecting definition of "second or successive" petition that would include prior petitions dismissed for failure to exhaust and stressing that "[t]he sequence of filing, dismissal, exhaustion in state court, and refiling in federal court might generate multiple docket numbers, but it would not be right to characterize it as successive collateral attacks. The prisoner launched a single campaign; that skirmishes were spread across several years and two forums would not make it apt to call any of the steps a 'successive' collateral attack."); In re Turner, 101 F.3d 1323 (9th Cir. 1997) ("We hold that section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies"); Dickinson v.

Given the eccentric nature of the ruling below and the published opinion in Farmer on which it relies, Mr. Slack suggests that the issue is ripe for this Court's consideration. Supreme Court Rule 10(a). The ruling below applies the strict abuse-of-the-writ standards of McCleskey in a manner this Court could never have intended, and appears to have done so solely to address the potential situation where a litigant abuses the exhaustion process to delay the ultimate disposition of the case. But the procedural history here demonstrates beyond dispute that Mr. Slack -- who did not have counsel to represent him in state or federal post-conviction proceedings until filing the operative petition here -- was not attempting to delay a ruling on the validity of his conviction and life sentence. And even if he was, a district court faced with what it truly believes to be abusive litigation tactics in the first round of federal habeas corpus proceedings can already: (1) invoke the provisions of Rule 9(a) where the State can prove that intentional delay by the petitioner results in prejudice to the State; (2) stay the original proceeding during the exhaustion process and then deny leave to amend a petition under Fed. R. Civ. Pro. 15(a) if the amendment process is being used in an abusive fashion; or (3) reach the merits of the petition under Granberry v. Greer, 481 U.S. 129, 134 (1987), if the district court determines that "the interests of comity and federalism will be better served by addressing the merits forthwith."

The one thing the lower courts cannot do, however, is exactly what they did do here: Depart from settled interpretations to formulate "ad hoc" reasons for dismissal that are "not encompassed

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Maine, 101 F.3d 791 (1st Cir. 1996) (holding that petition, filed after first petition was dismissed for failure to exhaust, is not a "second or successive" one); Camarano v. Irvin, 98 F.3d 44, 46 (2d Cir. 1996) ("When a petition is dismissed without prejudice for failure to exhaust, there is no federal adjudication on the merits. To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether.").

within the framework of Rule 9." Lonchar v. Thomas, 517 U.S. 314, 321 (1996). Indeed, as this Court emphasized in Lonchar, 517 U.S. at 324, the "arguments against departure from settled rules would seem particularly strong when dismissal of a first habeas petition is at issue."[6] But the lower courts have engaged in just such a departure here, in breach of both Lonchar and the promise of Rose v. Lundy, 455 U.S. at 520, where in justifying the rule of complete exhaustion, this Court assured prisoners who had filed federal petitions but failed to exhaust state remedies that they "nevertheless are entitled to resubmit a petition" once they had presented to the state courts all of the issues upon which they sought relief from federal court. Professors Liebman and Hertz best sum up the arbitrariness of such a rule in their treatise Federal Habeas Corpus Practice and Procedure: "[a]pplying the no-second-bite rule makes no sense when a prior petition gave the prisoner what amounts to *no* bite at the apple . . . . " Liebman & Hertz, § 28.3a (2d ed. 1994); see also § 28.4d ("a second or subsequent petition is not truly 'successive' if the prior petition, although attacking the same judgment, was dismissed without prejudice.") Mr. Slack has never had a bite at the apple, and the lower courts' arbitrary deprivation of that opportunity was fundamentally unfair. If it does not GVR, this Court should grant plenary review to correct the unprecedented rule applied by the lower courts, which conflicts with every other circuit that has considered the issue.

VIII.

CONCLUSION

By determining that the current petition was "second or successive" and thereby applying

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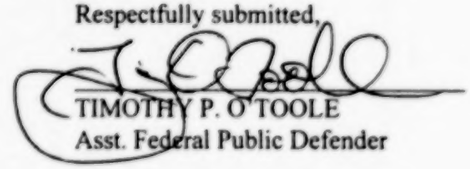
[6] And see *Lonchar*, 517 U.S at 330 ("given the importance of a first federal habeas petition it is particularly important that any rule that would deprive of all access to the writ should be both clear and fair").

the severe default rules of McCleskey before completion of the first round of habeas review, the lower court decisions ran afoul of the intervening authority in Martinez-Villareal, as well as every other published opinion on the subject. The most efficient way to resolve this problem is to grant the petition, vacate the judgment and remand to the Court of Appeals for reconsideration in light of Martinez-Villareal. In the alternative, this Court should grant plenary review to resolve the split of authority created by the unprecedented decisions below.

Respectfully submitted,



TIMOTHY P. O'TOOLE
Asst. Federal Public Defender

CERTIFICATE OF SERVICE

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on October 2, 1998, she served a copy of the attached Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis by personally placing a copy in the United States Mail, postage paid to the addressee named below:

Julie Slabaugh
Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717

Solicitor General of the United States
Department of Justice
Room 5614
10 Street & Constitutional Ave. N.W..
Washington, D.C. 20530

Antonio Tonton Slack
#31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Jacque Magee
Jacque Magee, Secretary

000024

CAROL C. FITZGERALD CLERK
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1991

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK, CV-N-91-561-HDM

Petitioner,

v. ORDER TO SHOW CAUSE

DIRECTOR, NEVADA DEPARTMENT OF PRISONS and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

Petitioner is in state custody, having been sentenced in May 1990. Based on the petition filed herein, and good cause appearing:

It is hereby ORDERED that the clerk of the court forward copies of said petition in this order to the Attorney General of the State of Nevada and to the respondent, Director, Nevada Department of Prisons.

It is further ORDERED that the respondents file a response to the petition on or before the 27th day of December, 1991, on the merits of the petition. Respondents shall serve a copy of the response upon Petitioner.

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It is further ORDERED that if any pleading or other paper submitted to be filed and considered by the court does not include a certificate of service upon Respondents or counsel for Respondents, it will not be considered by the court, and it will be returned to the petitioner.

Dated this 9th day of December, 1991.

Howard G. McKibben
UNITED STATES DISTRICT JUDGE

CAROL C. FITZGERALD
CLERK
BY DEPUTY
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AND FILED
Feb 20 7 22 PM '92

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ANTONIO TONTON SLACK,
Plaintiff(s),
vs.
DIRECTOR, NEVADA DEPARTMENT OF PRISONS, et al.,
Defendant(s).

CV-N-91-561-HDM

MINUTES OF THE COURT

February 19, 1992

PRESENT: HONORABLE HOWARD D. McKIBBEN, U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart Reporter/Recorder: Donna Casey

Counsel for Plaintiff(s): Antonio Tonton Slack, in Pro Se

Counsel for Defendant(s): Kevin G. Higgins

PROCEEDINGS: Telephonic Hearing on Petitioner's Motion to Stay Habeas Proceedings (#5)

9:10 a.m. Court convenes.

Court and counsel confer.

There being no objection by either party,

IT IS ORDERED that this action is dismissed without prejudice. Petitioner is granted leave to file an application to renew upon exhaustion of all State remedies.

9:15 a.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By: Bette Stewart
Deputy Clerk

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

FEB 11 1 35 PM '93
CLERK
FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff,	)	CASE NO. C92060
	)	DEPT. NO. IV
-vs-	)	DOCKET NO. C
ANTONIO TONTON SLACK, #0926733 Defendant,	)	

O R D E R

DENYING PROPER PERSON PETITION FOR

POST-CONVICTION RELIEF

DATE OF HEARING: 9-2-92
TIME OF HEARING: 9:00 A.M.

The Proper Person Petition for Post-Conviction Relief of Antonio Tonton Slack having come before the above entitled Court on the 2nd day of September, 1992, this Court having duly considered the Proper Person Petition for Post-Conviction Relief and Respondent's Answer in Opposition to the Petition for Post-

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Conviction Relief and good cause appearing the Court does hereby enter the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

1. The trial of this matter occurred between February 20 and February 22, 1990 in Department IV of the Eighth Judicial District Court. The trial jury returned a verdict of guilty of Murder of the Second Degree With Use of a Deadly Weapon. Thereafter, the court imposed consecutive sentences of life with the possibility of parole in the Nevada State Prison. Additionally, the Court stipulated that Slack should pay $2,413.50 in restitution.

2. A direct appeal was pursued to the Nevada Supreme Court and by its Order Dismissing Appeal filed November 5, 1991 the conviction and sentence of Slack were affirmed.

3. Defendant Slack did cause to be filed on July 10, 1992 a Proper Person Petition for Post-Conviction Relief wherein he alleged that he had received ineffective representation of counsel at the trial and appellate levels and that the Court had committed judicial error during his trial proceedings. The Court does expressly find that all of the allegations raised by the Defendant are contradicted by the record in this case. Slack was represented by Michael Gardner of the Clark County Public Defender's Office at the trial and appellate levels. The Court finds that his representation was effective, professional, vigorous and thorough. The petition of Slack has failed to establish that the representation of Michael Gardner was deficient or that Slack was

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prejudiced by the manner in which he was defended by counsel.

4. Slack has complained in his petition that his trial counsel failed to determine what type of agreement was reached with Kamal Bey, who was a principal State's witness. The Court finds that this contention is totally specious. The preliminary hearing and the trial record explicitly established the nature of the agreement between Bey and law enforcement. In return for Bey's cooperation as a witness the State of Nevada agreed to withdraw its motion to have Kamal Bey certified to stand trial as an adult. However, the substantive charge of accessory to murder in the juvenile system was not affected by the agreement. Subsequently, Bey was committed to Elko for six months as a result of the finding in Juvenile Court regarding the accessory to commit murder offense. Accordingly, this Court finds that Defendant Slack and his attorney were completely aware of the parameters of the agreement reached between Kamal Bey and the prosecution. Further, this Court finds that trial counsel was not ineffective in failing to file a pre-trial motion in limine to exclude the testimony of Kamal Bey. Nothing about the status of Kamal Bey made him incompetent to be a prosecution witness. Effective trial representation does not require the filing of frivolous pre-trial motions. Slack argues that his trial counsel failed to interview Slack's brother to refute the testimony of Kamal Bey. However, the testimony of a family member would have been inherently suspect and of questionable credibility in the eyes of the jury. Also, this contention is a naked allegation unsupported by any factual predicate. Slack

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contends that his counsel was ineffective in failing to file a pre-trial motion in limine to exclude reference to prior sexual relations with the victim. This contention is frivolous. In its Order Dismissing Appeal filed November 5, 1991 the Nevada Supreme Court ruled that the prosecution's reference to the intimate relationship between Slack and the victim was properly admitted as evidence of Slack's credibility after he denied having a boyfriend/girlfriend association with the victim. Hence, this issue has already been addressed by the State Supreme Court and the Court finds that their previous ruling remains the law of this case. Slack submits that his counsel was ineffective in not requesting an accomplice instruction. This Court finds no evidence that Kamal Bey was an accomplice to murder. Consequently, the Court would not have given an accomplice instruction had one been proffered by trial counsel for Defendant Slack. Slack also argues that he was prejudiced by the failure of his counsel to present evidence to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey. This assertion is a naked allegation unsupported by the record. Furthermore, Defendant Slack made various admissions to citizens and to representatives of the North Las Vegas Police Department accepting responsibility for the shooting of Alanna Holmes. Accordingly, the Court finds that the totality of the evidence introduced at the trial was overwhelming proof that Slack was the shooter of Alanna Holmes.

5. Slack also argues that he received ineffective representation during his direct appeal. The Court finds that this

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contention is without merit. Slack contends that a Franklin violation should have been raised on direct appeal. However, there is no evidence that Kamal Bey was an accomplice in the shooting of the victim. The only evidence involved Kamal Bey as an accessory to the murder of Alanna Holmes. The Franklin rule applies to accomplice testimony. Therefore, the Court finds that the Franklin issue was not applicable to this case. Likewise, since there is no evidence that Bey was an accomplice it was not incumbent upon appellate counsel to argue before the State Supreme Court that an accomplice instruction should have been given to the trial jury. Additionally, this Court finds no evidence of prosecutorial misconduct in the record of the trial proceedings. So, the failure of appellate counsel to raise the issue of prosecutorial misconduct does not establish ineffective representation.

6. The Court also rejects all arguments by Slack that judicial error occurred at his trial. This Court finds that the trial court properly instructed the trial jury. Instructions regarding accomplice testimony were not applicable in that no accomplice testified. The issue regarding premeditation is now academic. The trial jury convicted Slack of Murder of the Second Degree With Use of a Deadly Weapon and not murder of the first degree.

CONCLUSIONS OF LAW

1. Slack's claim of ineffective assistance of counsel must be analyzed under the "reasonably effective assistance" standard articulated in Strickland v. Washington, 466 U.S. 668 (1984), and

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adopted by the Nevada Supreme Court in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied 471 U.S. 1004 (1985). The Strickland standard requires a two-prong analysis. First, a defendant must show that his counsel's performance was deficient. This analysis requires a showing that counsel made errors so serious that a defendant's attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced his defense and caused him to be deprived of his right to a fair trial. See also Bejarano v. State, 106 Nev. 840, 842, 801 P.2d 1388 (1990). This Court concludes as a matter of law that Defendant Slack has failed to establish that his trial and appellate counsel provided ineffective representation and Slack has failed to show that he suffered any prejudice by the manner in which he was represented at the trial and appellate levels. Additionally, Defendant may not litigate in a petition for post-conviction relief matters which have been decided on his direct appeal. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975); Walker v. State, 85 Nev. 337, 343, 455 P.2d 34 (1969) and State v. Loveless, 62 Nev. 312, 150 P.2d 1015 (1944).

2. Further, the Court concludes that Slack's proper person petition consists entirely of factual claims which are belied or repelled by the record of these proceedings. A defendant seeking post-conviction relief is not entitled to an evidentiary hearing or to any of the remedies he seeks based upon factual allegations which are contradicted by the record. See Hargrove v. State, 100

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Nev. 498, 686 P.2d 222 (1984) and Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981).

DECISION

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is the Order of this Court that Defendant Slack's Proper Person Petition for Post-Conviction Relief is hereby denied.

DATED this 11th day of February, 1993.

DISTRICT JUDGE

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799

BY
MELVYN T. HARMON
Chief Deputy District Attorney
Nevada Bar #000862

kjh

JUN 30 '95
CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO TONTON SLACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 25088

FILED
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JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

On May 23, 1990, the district court convicted appellant of one count of second degree murder with use of a deadly weapon. The district court sentenced appellant to serve in the Nevada State Prison two consecutive terms of life with the possibility of parole. This court dismissed appellant's direct appeal. Slack v. State, Docket No. 21421 (Order Dismissing Appeal, November 5, 1991).

On July 10, 1992, appellant filed in the district court a petition for post-conviction relief. In his petition, appellant argued that he was denied his right to effective assistance of counsel at trial and that he was denied his right to effective assistance of counsel on direct appeal. Appellant further argued that the district court erred by failing to instruct the jury on the credibility of accomplice testimony and premeditation. Specifically, appellant stated the following about his trial attorney: 1) he failed to find out what type of agreement was made with Kamal Bey, the state's key witness and appellant's co-defendant; 2) he failed to file a motion in limine to prohibit the introduction of evidence concerning prior sexual relations with the victim; 3) he failed to file a motion in limine to prohibit the testimony of Kamal Bey because Bey's agreement with the state required specific

testimony by Bey; 4) he failed to interview appellant's brother even though the brother's testimony would have rebutted Bey's testimony; 5) he failed to examine Bey about Bey's agreement with the state; 6) he failed to request an accomplice instruction; and 7) he failed to introduce evidence concerning fingerprints belonging to Bey which were found on the murder weapon. Further, appellant stated the following about his appellate attorney: 1) he failed to raise as an issue on appeal a Franklin violation which occurred during trial; 2) he failed to raise the issue that appellant's trial counsel failed to request an accomplice instruction; 3) he failed to raise the issue that Kamal Bey was a co-defendant and thus Bey's testimony was questionable; and 4) he failed to raise the issue that there was prosecutorial misconduct in that the prosecutor failed ~~to~~ inform the jury that Bey was a co-defendant and that Bey's fingerprints were the only fingerprints found on the murder weapon.

The state opposed appellant's petition. In its opposition, the state claimed that appellant's allegations are repelled by the record. On February 11, 1993, the district court, without appointing counsel or conducting an evidentiary hearing, denied appellant's petition for post-conviction relief. The district court concluded that appellant's allegations are belied or repelled by the record and that appellant was not entitled to an evidentiary hearing on his claims. This appeal followed.

When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Our review of the record on appeal and specifically our review of the transcript of appellant's trial,

reveals that appellant's claims are repelled by the record. The terms of the state's agreement with Bey were fully disclosed to the jury. At trial, appellant's theory of the case was that he accidentally shot the victim. Appellant testified that his finger was on the trigger when the gun fired. It is therefore irrelevant that Bey's fingerprints were found on the weapon. Bey was neither an accomplice nor a co-defendant. Appellant was not prejudiced by the lack of an accomplice testimony instruction. Appellant's remaining claims are similarly repelled by the record. The district court properly denied appellant's petition for post-conviction relief.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant cannot demonstrate error in this appeal, and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Accordingly, we

ORDER this appeal dismissed.

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

cc: Hon. Gerard J. Bongiovanni, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex A. Bell, District Attorney
Antonio Tonton Slack
Loretta Bowman, Clerk

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JONTO TONTON SLACK, Petitioner
Full Name)

vs.

S.K. McDANIEL, Respondent.
Name of Warden, Superintendent,
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ustody of petitioner.)

and

he Attorney General of the State
f NEVADA, Additional
Respondent.

IOTE: if petitioner is attacking a
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CV-N-95-00194-DWH (N/A)

**Petition For A
WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. §2254
BY A PERSON IN STATE CUSTODY**

1) Name and location of the court which entered the judgement of conviction under attack: THE 8th JUDICAL DISTRICT COURT LAS VEGAS NEVADA

2) Date judgement of conviction was entered: MAY 22, 1990

3) Case number: C-92030

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5 YEARS TO LIFE TERMS

a) In a capital case where death penalty has been imposed, date of scheduled execution N/A

BEST AVAILABLE COPY

5) Are you pesently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

Yes [ ] No [XX]

6) Nature of the offense involved; (all counts) SECOND DEGREE MURDER WITH THE USE of DEADLY WEAPON

7) What was your plea? (check one)

a) Not Guilty [XX] b) Guilty [ ] c) Nolo Contendere [ ]

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement:

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

a) A jury [XX] b) A judge without a jury [ ]

10) Did you testify at trial (if any)? Yes [XX] No [ ]

11) Did you appeal from the judgement of conviction?

Yes [XX] No [ ]

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): THE SUPREME COURT of NEVADA, CARSON CITY, NV. ~~DISMISS~~ DISMISSED on NOV. 05, 1991 CASE NO. 21421

13) If you did not appeal, explain briefly why you did not: _____

a) Did you seek permission to file a late appeal?

Yes [ ] No [ ]

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: PETITIONER WAS DENIED HIS 6th AMENDMENT RIGHT TO AN EFFECTIVE ASSISTANCE of COUNSEL AT PRE-TRIAL & TRIAL; & PETITIONER DENIED HIS 6th AMENDMENT TO EFFECTIVE ASSISTANCE of COUNSEL ON DIRECT APPEAL

(2) Supporting Facts: (Without citing legal authority or arguments state briefly the facts which support your claim.)

SEE ATTACHED PAGE 3A-3B

'SE NO.

ST-CONVICTION PETITION WRIT of HABEAS CORPUS

ROUN ONE SUPPORTING FACTS:

PETITIONER'S COUNSEL of RECORD FAILED TO CONDUCT PROPER PRE-TRAI/ D TRIAL PROCEEDINGS IN The following MANNERS: FAILED to find OUT WHAT Kind of deal KAMAL BEY, MADE WITH the 'ATE FOR HIS TESTIMONY. 2) FAILED TO FILE A PRE-TRAI MOTION IN LIMINE STOP The INTRODUCTION of PRIOR SEXUAL RELATIONS with The VICTIM. FAILED TO file A PRE-TRIAL MOTION IN LIMINE To Stop the Testimony of KAMAL BEY, HIS DEAL With The STATE WAS BASED TOTALLY ON HIS TRIAL TESTIMONY, IN THAT THE HE WASN'T Completed. 4) FAILED TO INTERVIEW DEFENDANT'S Brother TO REFUTE : TESTIMONY of KAMAL BEY. 5) TRIAL COUNSEL FAILED TO have disclosed WHAT AL WAS MADE WITH KAMAL BEY AND the STATE. 6) COUNSEL FAILED TO REQUEST ACCOMPLICE INSTRUCTION. 7) COUNSEL FAILED to HAVE IT DISCLOSED TO The JURY That ONLY FINGERPRINTS found on The MURDER WEAPON WERE NOT the DEFENDENT'S AND 'E Those of KAMAL BEY The DEFENDENT'S Co-DEFENDENT. 8) COUNSEL FAILED to PRESENT the JURY that KAMAL BEY WAS A KNOWN GANG MEMBER. ~~PETITIONER~~ PETITIONER. 'PEAL COUNSEL WAS INEFFECTIVE AND PREJUDICED This PETITIONER By FAILING To ISE The following ISSUES ON APPEAL:

~~APPELLATE~~ APPELLATE COUNSEL FAILED TO RAISE A FRANKLIN ISSUE ON DIRECT APPEAL. APPELLATE COUNSEL FAILED TO RAISE THAT TRIAL COUNSEL FAILED to Request AN Accomplice struction from the TRIAL COURT. 3) APPELLATE COUNSEL FAILED TO RAISE INEFFECTIVE :SISTANCE of TRIAL COUNSEL ON DIRECT APPEAL. 4) APPELLATE COUNSEL FAILED to RAISE 'E ~~ISSUE~~ ISSUE that there WAS PROSECUTORIAL MISCONDUCT WHEN ~~THE~~ The PROSECUTOR LED To Inform THE JURY That KAMAL BEY WAS A SUSPECT AND also CO-DEFENDENT. PPELLATE COUNSEL FAILED To RAISE The ISSUE That KAMAL Bey's TESTIMONY WASN'T ST WORTHY DUE ~~TO~~ To the FACT that KAMAL BEY WAS A CO-DEFENDENT.

COUNSEL'S FAILURE TO DO The ABOVE PREJUDICED This PETITIONER AND

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgement of conviction did you raise this issue? Yes [ ] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: WRIT of Habeas Corpus Post-Conviction (PURSUANT TO 177.315 ET. SE The 8th JUDICIAL COURT DISTRICT of CLARK COUNTY. DENIED 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition? Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition? Yes [XX] No [ ]

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Tes [ ] No [ ], and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): IN THE SUPREME COURT of THE STATE of NEVADA CARSON CITY, NV. CASE NO. 25088 DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

B)(1)Ground Two: THE TRIAL COURT VIOLATED PETITIONER'S 6th AND 14th AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL TRIAL.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

THE TRIAL COURT DEPRIVED THE PETITIONE of His Rights to A FAIR AND IMPARTIAL TRIAL. When THE TRIAL COURT failed to Properly INSTRUCT the JURY ON Accomplice's Testimony.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes [ ] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

Post-conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision : WRIT of HABEAS CORPUS (Post-Conviction) PURSUANT TO 177.315 ET. SEQ, THE 8TH JUDICIAL DISTRICT COURT of THE STATE of NEVADA IN AND for THE COUNTY of CLARK LAS VEGAS, NV. DENIED 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition? Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition? Yes [XX] No [ ]

(g) If your answer to (f) is "yes', state whether This issue was raised in the appeal, Yes [ ] No [ ], and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): IN THE Supreme COURT of The STATE of NEVADA CARSON City, NEVADA DISMISSED ON DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "no", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

c)(1) Ground Three: THERE WAS PROSECUTORIAL MISCONDUCT IN PETITIONER'S CASE THAT PREJUDICED PETITIONER

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

THE PROSECUTION WITH HELD from JURY that THE ONLY FINGERPRINTS FOUND ON THE MURDER WEAPON WERE HAMAI BEY, ALSO THAT HE WAS A CO-DEFENDANT IN THE CASE.

(3) Sttement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes [ ] No [XX]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: ATTORNEY of RECORD DIDNOT RAISE this ISSUE on direct Appeal

Post-Conviction Proceddings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the the court where the motion or petition was filed, the result and date of the court's decision: WRIT of Habeas CorpusPOST-CONVICTION PURSUANT TO 177.315 ET. SEQ.) THE 8th JUDICIAL COURT COUNTY of CLARK, NEV. 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition? Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition? Yes [XX] No [ ]

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes [ ] No [ ], and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): THE SUPPEME COURT of NEVADA CARSON CITY, NV DISMISSED DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain:

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue:

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes [XX] No [ ]

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them:

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes [XX] No [ ]. If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: U.S. DISTRICT COURT, DISTRICT of NEVADA. 1) INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT. 2) TRIAL COURT IMPROPERLY ALLOWED PRE-JUDICIAL EVIDENCE of PRIOR SEXUAL RELATIONS 3) THE REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS; 4) PREMEDETATION WAS IMPROPERLY defined TO JURY. PETITION FOR WRIT of HABEAS CORPUS, PURSANT TO 28 U.S.C. 2254 DISMISSED without PREJUDICE FEBRUARY 19, 1992

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack?
Yes [XX] No [ ]. If "Yes", state the name of the court and the nature of the proceeding: UNITED STATES DISTRICT COURT, PETITION of WRIT of HABEAS CORPUS PURSANT TO 28 U.S.C. 2254
CASE NO. CV-N-91-561-HDM

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction? Yes [XX] No [ ] If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: R. MICHAEL GARDNER, DPD; TREAL & APPEAL 309 S. THIRD STREET LAS VEGAS, NV. 89155
VICTOR AUSTIN, DPD, ARRAIGNMENT AND PLEA 309 S. THIRD STREET LAS VEGAS, NV. 89155
R. MICHAEL GARDNER DPD, SENTENCING [redacted] 309 S. THIRD STREET LAS VEGAS, NV. 89155
COUNSEL'S APPOINTED by THE COURT.

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

Antonio T. Slack
Signature of Attorney (if any) Signature of Petitioner

Attorney"s full address and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. § 1746. 18 U.S.C. § 1621.

Executed at Ely State Prison (Location) on May 19 (Date), 19 95

Antonio T. Slack
(Signature)

ANTONIO T. SLACK #31393
P. Box 1989
ELY, NEV. 89301

PER SE

UNITED STATES DISTRICT COURT
DISTRICT of NEVADA

TONIO T. SLACK,
PETITIONER,
V
CTOR, NDOP, ET AL.,
RESPONDANT /

CASE NO. CV-N-95-194-DWH

MOTION FOR APPOINMENT of COUNSEL

COMES NOW PETITIONER, ANTONIO T. SLACK, proceeding IN PER SE, WITH THE ASSISTANCE of HIS INMATE LAW CLERK, [redacted] #[redacted], and hereby moves this COURT for IT'S ORDER APPOINTING COUNSEL IN THIS HABES CORPUS WRIT ACTION.

This MOTION is MADE in Good faith and based upon: 28 U.S.C. SEC. 1915 (D) AND 18 U.S.C. SEC. 3006A (G) and is further made and based upon these pleadings and papers on file herein and AFFIDAVIT.

DATED This ____ DAY of June, 1995.

Respectfully Submitted,

Antonio T. Slack

ANTONIO T. SLACK #31393
P.O. Box 1989
ELY NEV. 89301

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK
PETITIONER,

V

DIRECTOR, NDOP, ET AL.,
RESPONDANT

CASE NO. CV-N-95-194-DWH

AFFIDAVIT OF PETITIONER

I, ANTONIO T. SLACK, hereby sweah under the penalty of prejury appear under oath and state that:

1) PETITIONER IS INDIGENT AND CANNOT AFFORD TO PAY FOR AN ATTORNEY TO REPRESENT HIM IN THIS MATTER.

2) PETITIONER IS ILLITERATE AND INCOMPETENT WITH THE KNOWLEDGE OF LITIGATING THE L.A.W.

3) PETITIONER HAS BEEN RECEIVING ASSISTENCE FROM INMATE LAW CLERKS ASSIGNED TO NDOP'S LAW LIBRARIES ON THIS CASE.

4). PETITIONER'S CASE HAS MERIT AND A GOOD CHANCE OF SUCCESS WITH THE ASSISTANCE OF AN ATTORNEY, PER THE NEVADA BAR ASSOCIATION AND AMERICAN BAR ASSOCIATION.

DATED THIS _____ DAY OF _____, 1995

_____

ANTONIO T. SLACK #31395

Respectfully Written and Submitted,

Mr. Antonio T. Slack
ANTONIO T. SLACK 31395
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Written - and signed on the ___ day of June 1995.

Certificate of Service

I, Antonio T. Slack, an Ely State Prisoner on the ___ day of June, 1995. Have placed in the United States mail a true and correct copy of this letter ~~[illegible]~~ addressed to the following:

Frankie Sue Del Papa / ATTORNEY GENERAL /
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89301

_____

ANTONIO T. SLACK #31395
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

98-6322

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANTONIO TONTON SLACK, Petitioner

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA, Respondents.

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI VOLUME I

Supreme Court, U.S.
FILED
OCT 5 1998
OFFICE OF THE CLERK

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada
*TIMOTHY P. O'TOOLE
Asst. Federal Public Defender
330 S. Third St., #700
Las Vegas, Nevada 89101
* Counsel for Petitioner

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SUPREME COURT, U.S.

40 pp

VOLUME I

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Federal Public Defender
Las Vegas, Nevada

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
MAR 31 1998
CLERK, U.S. DISTRICT COURT
BY _____ DEPUTY

AO 72 (Rev. 8/82) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FILED
98 MAR 31 AM 8:24
LANCE S. WILSON
CLERK
BY _____ DEPUTY

ANTONIO A. SLACK,

Plaintiff,

V.

E.K. MCDANIEL, et al, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **CV-N-95-194-DWH**

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

XX Decision by Court. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that respondents' motion to dismiss (#67) is **granted, and this action is dismissed without prejudice.**

March 31, 1998
Date

LANCE S. WILSON
Clerk

Marti Campbell
(By) Deputy Clerk

FILED
98 MAR 30 PM 4:16
LANCE S. WILSON
CLERK
BY _____ DEPUTY

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
MAR 31 1998
CLERK, U.S. DISTRICT COURT
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO A. SLACK, Petitioner,	)	Case No. CV-N-95-194-DWH
vs.	)	
E.K. McDANIEL, *et al.*, Respondents.	)	MEMORANDUM DECISION AND ORDER

Petitioner Antonio A. Slack has filed an amended petition for habeas relief pursuant to 28 U.S.C. § 2254 (#65). Respondents move to dismiss claiming several grounds are unexhausted and abusive (#66). The Court ordered Slack to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four(C), five, six and seven (#72). Slack has filed a motion for reconsideration of the court order (#73). For the reasons set forth below, the Court finds grounds two, four(C), five, six and seven are abusive and ground three is unexhausted. Therefore the petition must be dismissed.

BACKGROUND

In February 1990, a jury found Slack guilty of second degree murder with use of a deadly weapon. *See* #16, ex.12. Slack was sentenced to two consecutive life terms with the possibility of parole. *See* #16, ex.13. Slack filed a direct appeal with the Nevada Supreme Court which was dismissed. *See* #16, ex.22.

Slack then filed his first federal habeas petition with this court. *See* #16, ex.25. In his first habeas petition, Slack alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation instruction. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all state remedies. *See Slack v. Director of Nevada State Prisons*, CV-N-91-561-HDM.

In 1992, Slack filed a state habeas petition in the Eighth Judicial District Court of Nevada. *See* #16, ex.31. The district court denied the petition, *see* #16, ex.37, and the Nevada Supreme Court dismissed Slack's appeal. *See* #16, ex.39.

In 1995, Slack filed his second federal habeas petition with this Court (#4). After the Court appointed counsel for Slack (#43), he filed an amended habeas petition (#64). In Slack's amended habeas petition he clams he is entitled to relief because: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct

the jury[1]; (5) he was denied effective assistance of counsel[2]; (6) he was denied effective assistance of appellate counsel[3]; and (7) cumulative error.

In their motion to dismiss, respondents argue grounds two, four(C), five, six and seven are abusive. Respondents also argue grounds two, three, four (C), five (B-E), six and seven are unexhausted. Slack was ordered to show cause and prejudice to overcome the abusive bar; however he filed a motion for reconsideration which the court will deny.

ABUSE OF THE WRIT

A second petition may be dismissed for abuse of the writ if new grounds are alleged and the failure to allege them in the previous petition was an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 1548, 1555 (9th Cir.1996). The previous petition need not have been dismissed on the merits. *See id.* at 1557. The instant petition therefore may be subject to dismissal for abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. The State met that burden here by noting Slack's previous writ history, identifying the grounds for relief that appear for the first time in the instant petition and alleging that Slack abused the writ. *See id.* The burden now is on Slack to disprove abuse of the writ by showing cause for failing to raise the new grounds for relief earlier and prejudice therefrom. *See id.* Slack does not meet his burden.

---

[1] In ground four, Slack claims: (a) the reasonable doubt instruction was unconstitutional; (b) the premeditation and deliberation instruction was unconstitutional; and the malice aforethought instruction was unconstitutional.

[2] In ground five, Slack contends his trial counsel was ineffective when he: (a) failed to prevent the introduction of highly prejudicial evidence; (b) failed to object to reasonable doubt jury instruction; (c) failed to object to premeditation and deliberation jury instruction; (d) failed to object to malice aforethought jury instruction; and (e) failed to investigate the facts of case and develop available defenses.

[3] In ground six, Slack argues he was denied effective assistance of appellate counsel when: (a) appellate counsel failed to raise on direct appeal that Slack was denied his right the due process under the Fifth and Fourteenth Amendment when charged with open murder in an information which did not properly plead elements of first degree murder and that the malice aforethought instruction was unconstitutional; and (b) appellate counsel conceded two of the four issues raised on direct appeal.

In reply to the court order instructing Slack to file points and authorities showing cause and prejudice to overcome the abuse of the writ bar, he filed a motion for reconsideration (#73). First the Court notes that Slack has incorrectly filed his motion for reconsideration pursuant to Fed.R.Civ.P.59. Under this rule a party may move for a new trial or an amendment of a judgment. Since there has not been a trial and a judgment has not been entered in this case, Slack cannot bring a motion pursuant to this rule. Additionally even if Slack could bring a motion under Fed.R.Civ.P.59, the motion must be brought within ten days after the entry of judgment. *See* Fed.R.Civ.P. 59(e). Slack's motion was untimely since it was filed two days after the ten day period expired. Nevertheless, the Court will address Slack's arguments in his motion for reconsideration.

In his motion for reconsideration, Slack claims the State has not established the habeas petition is abusive, the amended petition is not successive, and that the case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). As previously noted, the State has met its burden under *McClesky* by specifying which grounds for relief in the amended habeas petition are abusive. Next, the instant petition is Slack's second petition and thus successive. The Ninth Circuit has held that a judge may find a second petition is abusive when new grounds are alleged and a petitioner failed to allege them in the previous petition, even if the previous petition was dismissed for failing to exhaust state remedies. *See Farmer*, 98 F.3d at 1557. Lastly, Slack wrongly asserts the case is governed by the AEDPA because it was commenced after April 26, 1996. First, the instant case was commenced March 27, 1995. Second, the amendments to 28 U.S.C. §§ 2244(a) and 2255 resulting from the AEDPA are not retroactive. *See Lindh v. Murphy*, --- U.S. ----, ----, 117 S.Ct. 2059, 2063 (1997). Accordingly, the AEDPA is not applicable to this case.

Thus, since Slack has failed to demonstrate cause and prejudice to overcome the abuse of the writ bar, the Court will dismiss grounds two, four(c), five, six and seven as abusive.

EXHAUSTION

Although respondents argue several grounds are unexhausted, the court will only address ground three since all other grounds will be dismissed as abusive. Title 28 U.S.C. § 2254 (b) and (c) provide that a state prisoner must exhaust all available state court remedies before filing a petition for habeas corpus in federal court. The exhaustion of available state judicial remedies is ordinarily a prerequisite to obtaining federal habeas corpus relief. 28 U.S.C. § 2254(b) (1988); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). To demonstrate compliance with the exhaustion requirement, a habeas applicant must show that the claim included in the federal petition was "fairly presented" to the state's highest court, *Picard v. Connor*, 404 U.S. 270, 275 (1971), or demonstrate that no state remedy remains available. *Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1992). A claim has been "fairly presented" to the state court if the petitioner has described the operative facts and the legal theory upon which he bases his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Furthermore, a petitioner cannot merely allege exhaustion; the record must show that the petitioner sought review in the highest state court. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 1023 (1982). In addition, the habeas petitioner must exhaust his state remedies as to each of his federal claims. If a habeas corpus petition contains both exhausted and non-exhausted claims, the petition must be dismissed. *Rose*, 455 U.S. at 520.

In ground three, Slack claims his Fourteenth and Fifth Amendment right to due process was violated when the jury was prejudiced by evidence of sexual misconduct. Respondents contend the claim is unexhausted because although Slack presented the facts of this claim to the Nevada Supreme Court, he did not claim his Fourteenth and Fifth Amendment rights were violated. If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Johnson v. Zenon*, 88 F.3d 828, 830 (1996); *see also Ybarra v. Sumner*, 678

F.Supp. 1480, 1481 (D.Nev. 1988) (citing *Picard*, 404 U.S. at 276). In his opening brief to the Nevada Supreme Court on direct appeal, Slack never argued his Fifth or Fourteenth Amendment right to due process was violated when prejudicial evidence was presented to the jury. In his opening brief, Slack relied only upon state law to support his claim. *See* #16, ex.20, pp. 15-18. Thus, the Court finds ground three is unexhausted.

CONCLUSION

Since ground three of Slack's third amended habeas petition is unexhausted, this action will be dismissed to allow Slack the opportunity to present the unexhausted claim to the state court. If Slack wishes to continue with this proceeding instead of returning to state court, he will need to re-open this proceeding and abandon the unexhausted claim as described below. *See Reutter v. Crande*, 109 F.3d 575 (9th Cir. 1997). Alternatively, Slack may immediately commence a new federal action in which this court could review the merits of the unexhausted claim because the new action would be subject to the statutory changes effected by the Antiterrorism and Effective Death Penalty Act (AEDPA)[4]; however, relief could not be granted based on any unexhausted claim.

Pursuant to the AEDPA, the dismissal of this action will trigger the commencement of the one year statute of limitations period for Slack to return to federal court with a new action. 28 U.S.C. § 2244(d)(1). The time during which Slack's post conviction proceeding is pending in state court will not count toward the one year period. 28 U.S.C. § 2244(d)(2). Therefore, if Slack waits three months after this dismissal to file a state post conviction petition, he will have only nine months from the disposition of that state proceeding in which to commence a new federal proceeding. The failure to timely commence a new federal proceeding will bar Slack from having the validity of his conviction and/or sentence reviewed in federal court.

---

[4] Until recently, a federal court could not proceed with a mixed petition that contained both exhausted and unexhausted claims for habeas corpus relief. *Rose*, 455 U.S. at 521-22; *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983). However, in April 1996, Congress amended 28 U.S.C. § 2254 to give federal courts the authority to deny habeas relief based on unexhausted grounds. Thus, now a federal court can address a mixed petition, but can only deny relief regarding any unexhausted grounds.

IT IS THEREFORE **ORDERED** that Slack's motion for reconsideration (#73) is **DENIED**.

IT IS FURTHER **ORDERED** that grounds two, four(C), five, six and seven are **DISMISSED** with prejudice as abusive.

IT IS FURTHER **ORDERED** that respondents' motion to dismiss (#67) is **GRANTED**, and this action is **DISMISSED** without prejudice. If Slack wishes to abandon the unexhausted claim and proceed with this action, he should file a motion to vacate the judgment and a declaration of abandonment, signed by petitioner, of the above identified ground within thirty (30) days. The Clerk shall enter judgment accordingly.

Dated this 30th day of March, 1998

UNITED STATES DISTRICT JUDGE

RECEIVED
JUL - 9 1998
Federal Public Defender
Las Vegas, Nevada

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL - 7 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ANTONIO TONTON SLACK, Petitioner, vs. E. K. MCDANIEL, Attorney General of the State of Nevada, Respondent.	No. 98-15943 DC# CV-95-194-DWH Nevada (Reno) ORDER

Before: THOMPSON and LEAVY, Circuit Judges

The request for a certificate of probable cause is denied.

mocal/6.29.98/bd

FILED
MAR 23 12 27 PM '90
Loretta Bowman
CLERK

DISTRICT COURT

Clark County, Nevada

THE STATE OF NEVADA, Plaintiff -vs- ANTONIO TONTON SLACK, #0926733 Defendant,	CASE NO. C92060 DEPT. NO. IV JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 8th day of January, 1990, the Defendant ANTONIO TONTON SLACK, entered a plea of not guilty to the crime of MURDER WITH USE OF A DEADLY WEAPON committed on or about the 4th day of November, 1989, in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury, and the defendant being represented by counsel and having been found guilty of the crime of SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (F); and

WHEREAS, thereafter, on the 16th day of May, 1990, the defendant being present in Court with his counsel MICHAEL GARDNER, Deputy Public Defender, and MELVYN T. HARMON, Chief Deputy District Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdicts and sentenced Defendant to the Nevada State Prison for LIFE WITH THE POSSIBILITY OF PAROLE (Second Degree Murder) plus a consecutive LIFE WITH THE POSSIBILITY OF PAROLE (Use of a Deadly

Weapon). Restitution $2,413.50. $20.00 Assessment Fee. Credit for Time Served 189 days.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 22 day of May, 1990, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.
DATE: 12-27-91
LORETTA BOWMAN, County Clerk and Clerk of the Eighth Judicial District Court, in and for the County and State aforesaid.
By Norma Aldred Deputy

89-92060X/kjh
NLVPD DR#89-12568
Second Degree Murder
w/wpn - F

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO TONTON SLACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 21421

FILED
NOV 05 1991
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction of second-degree murder with the use of a deadly weapon. Having reviewed the record and briefs and having heard the parties' arguments, we conclude that Slack was properly convicted. On direct examination, Slack denied that he had a girlfriend/boyfriend relationship with the twelve-year-old victim. The prosecution's reference to a sexual relationship between Slack and the victim was not improper.

The prosecution, on cross-examination, asked Slack whether he had told the North Las Vegas Police Department that he had had sexual intercourse with the victim on Halloween, 1989. Slack did not remember making any such statement. Slack contends that this reference to an intimate relationship was improperly admitted because the jury was prejudiced by the thought of a nineteen-year-old man and a twelve-year-old girl having a sexual relationship.

We conclude that the prosecution's reference to the intimate relationship of Slack and the victim was properly admitted as evidence of Slack's credibility after he denied having a boyfriend/girlfriend relationship with the victim. The

trial court has discretion over the limitations of cross-examination, Dyer v. State, 99 Nev. 422, 425, 663 P.2d 699, 701 (1983), and that discretion was not abused here.

Furthermore, any error in allowing this line of cross-examination was harmless, considering the amount of evidence linking Slack to the shooting. The fact that the jury returned a verdict of second-degree murder, when it was also instructed on first-degree murder, indicates that the disputed evidence was not prejudicial.

At oral argument, Slack's counsel conceded that the other issues raised in the brief were clearly without merit.

Accordingly, we hereby

ORDER this appeal dismissed.

Mowbray, C.J.

Springer, J.

Rose, J.

Steffen, J.

Young, J.

cc: Hon. Jack Lehman, Chief Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex Bell, District Attorney
Morgan D. Harris, Public Defender
Loretta Bowman, Clerk

RECEIVED
NOV 15 1991
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK
Name

31395
Prison Number

ELY STATE PRISON
Place of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK, Petitioner
(Full Name)

vs.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS, Respondent
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.)

and

The Attorney General of the State of NEVADA, Additional Respondent.

(NOTE: If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment of conviction was entered.)

CV-N----91-561-H

CASE NO. _____
(To be supplied by the Clerk)

PETITION FOR A
WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. §2254
BY A PERSON IN STATE CUSTODY

1) Name and location of the court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, LAS VEGAS, NEVADA

2) Date judgment of conviction was entered: MAY 1990

3) Case number: C92060.

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5-YEARS-TO-LIFE SENTENCES

a) In a capital case where death penalty has been imposed, date of scheduled execution NOT APPLICABLE

5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

Yes /__/ No /XXX/

6) Nature of the offense involved: (all counts) _____

SECOND DEGREE MURDER WITH USE OF DEADLY WEAPON

7) What was your plea? (check one)

a) Not Guilty /XXX/ b) Guilty /__/ c) Nolo Contendere /__/

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: _____

NOT APPLICABLE

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

a) A jury /XXX/ b) A judge without a jury /__/

10) Did you testify at trial (if any)? Yes /XXXX/ No /__/

11) Did you appeal from the judgment of conviction?

Yes /XXX/ No /__/

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NEVADA SUPREME COURT NO. 21421 DISMISSED APPROX. OCT/NOV
PETITIONER DOES NOT POSSESS FINAL ORDER AT THIS TIME

13) If you did not appeal, explain briefly why you did not: _____

DID APPEAL / NOT APPLICABLE

a) Did you seek permission to file a late appeal?

Yes /__/ No /XXX/ WASN'T NECESSARY

14) State **concisely** every ground on which you claim that you are being unlawfully held. Summarize **briefly** the **facts** supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT THE DEFENDANT WITH SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

INCIDENT INVOLVED ACCIDENTAL SHOOTING, TESTIMONY SUPPORTS SAME, CONVICTION ON SECOND DEGREE MURDER IS WITHOUT ESSENTIAL ELEMENTS OF OFFENSE FOR SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON, INTENT AND POSSESSION OF WEAPON LACKING FACTUAL EVIDENCE OR TESTIMONY. ALSO SEE PETITIONER'S OPENING BRIEF FROM STATE COURT DIRECT APPEAL ON THIS CLAIM WHICH WAS CONSTITUTIONALLY RAISED ON BASIS OF JACKSON V. VIRGINIA, 443 U.S. 307 (1979).

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXX / No ___/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes ___/ No XXXX

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes ___/ No ___/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes ___/ No ___/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes ___/ No ___/, N/A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSU

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSUE

B)(1) Ground Two: THE TRIAL COURT IMPROPERLY ALLOWED PREJUDICIAL EVIDENCE OF A SEXUAL RELATIONSHIP BETWEEN THE DEFENDANT AND THE TWELVE YEAR OLD VICTIM.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

EVIDENCE OF PRIOR BAD ACTS AND UNCHARGED MISCONDUCT VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER FOURTEENTH AMENDMENT AS FURTHER ARGUED IN THE DIRECT APPEAL, SEE ALSO DEFENDANT'S OPEN ING BRIEF IN STATE DIRECT APPEAL.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXXX/ No /__/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /__/ No XXX/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /__/ No /__/, A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT RULED ON ISSUE EXHAUSTING REMEDIES

C)(1) Ground Three: THE REASONABLE DOUBT INSTRUCTION TO JURY BY TRIAL COURT VIOLATED DUE PROCESS CLAUSE OF U.S. AND STATE CONSTITUTION (CAGE VS. LOUISIANA)

GROUND FOUR: TRIAL COURT ERRED BY NOT ADEQUATELY DEFINING PREMEDITATION IN JURY INSTRUCTIONS REGARDING MURDER.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

GROUND THREE: REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS CLAUSE OF BOTH THE U.S. AND NEVADA CONSTITUTIONS, SEE CAGE V. LOUISIANA, 111 S. CT. 328 (1990).

GROUND FOUR: TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS AS SHOWN IN DEFENDANT'S STATE COURT SUPREME COURT DIRECT APPEAL OPENING BRIEF (UNITED STATES V. GILBREATH, 452 F. 2d 992, 5th CIR. 1971), BY FAILING TO ADEQUATELY DEFINE "PREMEDITATION" IN JURY INSTRUCTIO

(3) Statement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXXX No /__/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /__/ No XXXX

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /__/ No /__/, N and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes /XXXXX No /__/

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them: NOT APPLICABLE

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes /__/ No /XXXXX If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: NOT APPLICABLE

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack? Yes XXXX No ___/. If "Yes", state the name of the court and the nature of the proceeding: NOT APPLICABLE

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction? Yes XXXXX No ___/. If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you were so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: FROM ARRAIGNMENT THRU TRIAL= MICHAEL GARDNER DEPUTY CLARK COUNTY PU ON DIRECT APPEAL = SAME COUNSEL ABOVE (MICHAEL GARDNER, DEP.P.D.)

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

REQUESTED 18 USC § 3006A-a
Signature of Attorney (if any)

/Antonio T. Slack
Signature of Petitioner

(Attorney's full address and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at ELY, NEVADA (Location) on NOVEMBER 12, (Date), 1991

/Antonio T. Slack
(Signature)

TONIC T. SLACK #31395
P. BOX 1989
ELY, NEV. 89301
PER-SE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TONIC T. SLACK,
PETITIONER,

V.

RECTOR, NDOP, ET. AL.,
RESPONDENT /

CASE NO. CV-N-95-194-DWH

ORDER APPOINTING COUNSEL

PETITIONER, AN ELY STATE PRISONER APPEARING IN PER SE AND IN FORMA PAUPERIS REQUESTING APPOINTMENT OF COUNSEL.

GOOD CAUSE APPEARING.

IT IS THEREFORE, HEREBY ORDERED THAT COUNSEL IS APPOINTED FOR PETITIONER.

DATED THIS ___ DAY OF June, 1995

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
MAR - 4 1996
CLERK, U.S. DISTRICT COURT
BY RD DEPUTY

FILED
96 FEB 29 PM 3:40
LANCE S. WILSON
CLERK
BY RD
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK,
Petitioner,
vs
DIRECTOR, NDOP, et al.,
Respondents

Case No. CV-N-95-194-DWH

ORDER

Respondents have filed a motion to dismiss the petition in this action (#15). Petitioner has failed to oppose the motion. Petitioner is hereby instructed to file points and authorities in opposition to the motion or respondents' motion will be granted. See Local Rule 110-2.

Petitioner has also moved for appointment of counsel (#8), which at this time will be denied.

IT IS THEREFORE ORDERED that Petitioner shall have twenty (20) days from the date of this order within which to file points and authorities in opposition to the motion. After petitioner's said response to the motion is filed, respondents shall thereafter have fifteen (10) days within which to file a reply. If petitioner fails to respond to this order, the motion will be deemed consented to and granted.

IT IS FURTHER ORDERED that petitioner's motion for appointment of counsel (#8) is DENIED.

DATED this 29TH day of February, 1996.

UNITED STATES DISTRICT JUDGE

6) The ends of justice would best be served in this case if an attorney was appointed to represent the Petitioner.

Petitioner has contacted an attorney who is willing to accept an appointment to represent him in this matter. See: (Attached) copy of letter from Joan D. Buckley, Esq. Also see: (Attached) affidavit of Petitioner. Ms. Buckley not only has expressed an interest in being appointed to represent Petitioner in this matter, but also possesses some knowledge of the issues herein.

THEREFORE, Petitioner respectfully requests this Honorable Court to appoint Ms. Buckley to represent him herein, or to appoint the Federal Public Defenders' Office should the Court be hesitant to name Ms. Buckley. See: (Attached) PROPOSED ORDER.

Dated Feb 23 1996

Antonio T. Slack
Ely State Prison
P. O. Box 1989
Ely, Nevada 89301

CERTIFICATE OF MAILING/SERVICE

I, Antonio T. Slack, hereby certify that on this date I served, by U.S. mail, a true and correct copy of this pleading with its attachments, to the following persons:

Frankie Sue Del Papa
Nevada Attorney General
Office of the Attorney General
Capitol Complex
Carson City, Nevada 89710

Joan D. Buckley, Esq. (Proposed Counsel)
302 E. Carson
Suite 508
Las Vegas, Nevada 89101

Dated Feb 23 1996

Antonio T. Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	Case No. CV-N-95-194-DWH ORDER APPOINTING COUNSEL

HAVING CONSIDERED PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL, and good cause appearing,

IT IS HEREBY ORDERED that Joan D. Buckley, Esq., 302 E. Carson, Suite 508, Las Vegas, Nevada 89101, is appointed to represent and assist Petitioner in the above entitled petition for writ of habeas corpus.

David W. Hagen
District Court Judge

RECEIVED
DEC 29 1997
Federal Public Defender
Las Vegas, Nevada

FILED
97 DEC 24 AM 11:14
LANCE S. WILSON
CLERK
BY

FRANNY A. FORSMAN
Federal Public Defender
DEBORAH A. TREVINO
Assistant Federal Public Defender
Attorney for Petitioner
330 South Third Street, Suite 700
Las Vegas, NV 89101

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK,

Petitioner,
vs.

E.K. McDaniel, Warden, Ely State Prison,

and

The Attorney General of the State of Nevada,
Respondents

CASE NO. CV-N-95-194-DWH

~~SECOND~~ THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY (NOT SENTENCED TO DEATH)

Petitioner alleges as follows:

1. The challenged conviction was entered in the District Court for the Eighth Judicial District of Nevada, Las Vegas, Nevada, Hon. Earl White, presiding .

2. Judgment of conviction was entered May 16, 1990.

3. An appeal was filed with the Nevada Supreme Court; the appeal was decided November 5, 1991.

4. A petition for post-conviction relief was filed on July 10, 1992 in the Eighth Judicial District Court. The court denied the petition on September 2, 1992 and an appeal was taken: the appeal was decided on December 30, 1993.

5. One previous petition for relief was filed pursuant to 28 U.S.C. §2254 in Case No. CV-N-91-561-HDM. It was dismissed without prejudice on February 19, 1992.

6. No other pleadings or actions are pending in any other court.

7. Petitioner was convicted by jury trial of second degree murder with the use of a deadly weapon in Case No. C-89-92060. Petitioner received two consecutive sentences of life with the possibility of parole. Petitioner began serving his sentence on May 16, 1990.

8. Petitioner was represented by the following attorneys in state court:

Pre-trial and Trial: Deputy Public Defenders Victor Austin and Michael Gardner

Appeal: Deputy Public Defender Michael Gardner (brief); Deputy Public Defender Steve Dahl (oral argument).

Post-conviction Petition: Pro Se

Appeal from Denial of Post-conviction relief: Pro Se

FACTUAL SUMMARY

9. Petitioner was charged with killing Alanna Holmes on November 4, 1989. Ms. Holmes died as a result of a shotgun wound. Petitioner admitted, at trial to shooting Ms. Holmes with a shotgun but asserted that the shooting was accidental. Antonio Slack admitted that he shot and was responsible for the death of the decedent Alanna Holmes.

STATEMENT OF PRIOR PROCEEDINGS

10. The Judgment of Conviction-Case No. C89-92060

Petitioner challenges his conviction imposed in Criminal Case No. C89-92960 in the Eighth Judicial District Court for the State of Nevada, in and for the County of Clark. Slack pleaded not guilty and was convicted following a jury trial. Sentence was imposed for second degree murder with the use of a deadly weapon.. Slack was sentenced to the Nevada state prison for a term of life with the possibility of parole (second degree murder) and a consecutive term of life with the possibility of parole (use of a deadly weapon).

11. The Direct Appeal-Nevada Supreme Court Docket No. 21421

An appeal was taken to the Nevada Supreme Court raising the following issues:

Issue One: Whether insufficient evidence was adduced at trial to convict the defendant of second degree murder with use of a deadly weapon?

Issue Two: Whether the trial court improperly allowed prejudicial evidence of a sexual relationship between the defendant and the twelve year old victim?

Issue Three: Whether the reasonable doubt jury instruction given by the trial court violated the due process clause of the United States and Nevada constitution?

Issue Four: Whether the court erred by not adequately defining premeditation in the jury instructions regarding murder?

On September 11, 1991, Deputy Public Defender Steve Dahl argued petitioner's direct appeal before the Nevada Supreme Court. Mr. Dahl did not author the appellate brief. At oral argument, Mr. Dahl indicated that he would present argument only on Issue Two. On November 5, 1991, the Nevada Supreme Court issued an order dismissing the appeal.

12. State Petition for Writ of Habeas Corpus (Post Conviction) Slack v. State of Nevada, Case No.C-92960

On July 10, 1992, petitioner, in proper person, filed a Post Conviction Petition for Writ of Habeas Corpus in the Eighth Judicial District Court. The petition raised the following grounds:

Ground One: Petitioner was denied his Sixth Amendment right to effective assistance of counsel pre-trial and at trial.

Ground Two: Petitioner was denied his Sixth Amendment right to effective assistance of counsel on direct appeal.

Ground Three: The trial court violated petitioner's Sixth and Fourteenth Amendment rights to a fair and impartial trial.

Ground Four: There was prosecutorial misconduct in petitioner's trial that prejudiced petitioner.

The petition for post conviction relief was denied in District Court, Clark County, Nevada on September 2, 1992. A formal order memorializing the court's decision was filed on February 11, 1993.

13. Appeal from order denying state Petition for Habeas Corpus (Post-Conviction) Slack v. State of Nevada, Case No. C-92060.

On December 30, 1993, the Nevada Supreme Court entered an Order dismissing the appeal from the denial of post conviction relief. Exhibit 3.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO T. SLACK,
Petitioner,
-vs-
DIRECTOR, NDOP, et al.,
Respondents.

Case No. CV-N-95-194-DWH

ORDER APPOINTING COUNSEL

HAVING CONSIDERED PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL, and good cause appearing,

IT IS HEREBY ORDERED that Joan D. Buckley, Esq., 302 E. Carson, Suite 508, Las Vegas, Nevada 89101, is appointed to represent and assist Petitioner in the above entitled petition for writ of habeas corpus.

David W. Hagen
District Court Judge

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
FEB 14 1997
CLERK, U.S. DISTRICT COURT
BY _____ DEPUTY

FILED
97 FEB 13 PM 12:42
LANCE S. WILSON
CLERK
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTHONY T. SLACK,

Petitioner,

vs

DIRECTOR, NDOP, et al.,

Respondents.

Case No. CV-N-95-194-DWH

ORDER APPOINTING COUNSEL

The motion for leave to proceed in forma pauperis shows that petitioner lacks the resources necessary to employ counsel to prosecute this habeas corpus proceedings in which he attacks the validity of his conviction and sentence. It appears to be in the best interest of justice that counsel be appointed to represent petitioner herein. Therefore, petitioner named above being financially unable to employ counsel, and because the interests of justice so require, the Federal Public Defender for the District of Nevada shall be appointed to represent petitioner.

Counsel for petitioner shall contact petitioner within twenty (20) days and: (a) review the procedures applicable in cases under 28 U.S.C. § 2254; (b) discuss and explore with petitioner, as fully as possible, the potential grounds for habeas corpus relief in Petitioner's case; and (c) advise petitioner that all possible grounds for habeas corpus relief should be raised at this time, and that the failure to do so may result in loss of the omitted grounds under the rules regarding abuse of the writ.

IT IS THEREFORE **ORDERED** that petitioner's Motion for Appointment of Counsel is GRANTED to the extent that the Federal Public Defender for the District of Nevada is hereby appointed to represent petitioner in these proceedings. The Clerk of the Court shall send a copy of this order to the Federal Public Defender with a copy of the amended petition for writ of habeas corpus (#31).

IT IS FURTHER **ORDERED** that counsel for petitioner shall file an amended petition for writ of habeas corpus within forty-five (45) days or a notice to the court indicating his or her intent to proceed with the current amended petition (#31).

IT IS FURTHER **ORDERED** that respondents' Motion for Enlargement (#42) is DENIED as moot.

IT IS FURTHER **ORDERED** that petitioner's Motion for Judgment on the Pleadings (#38) is DENIED. Such a motion is inappropriate until the pleadings have closed.

Dated this 13th day of February, 1997.

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK,

Petitioner,
vs.

E.K. McDaniel, Warden, Ely State Prison,

and

The Attorney General of the State of Nevada,
Respondents

CASE NO. CV-N-95-194-DWH

~~SECOND~~ THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY (NOT SENTENCED TO DEATH)

Petitioner alleges as follows:

1. The challenged conviction was entered in the District Court for the Eighth Judicial District of Nevada, Las Vegas, Nevada, Hon. Earl White, presiding .
2. Judgment of conviction was entered May 16, 1990.
3. An appeal was filed with the Nevada Supreme Court; the appeal was decided November 5, 1991.
4. A petition for post-conviction relief was filed on July 10, 1992 in the Eighth Judicial District Court. The court denied the petition on September 2, 1992 and an appeal was taken: the appeal was decided on December 30, 1993.
5. One previous petition for relief was filed pursuant to 28 U.S.C. §2254 in Case No. CV-N-91-561-HDM. It was dismissed without prejudice on February 19, 1992.
6. No other pleadings or actions are pending in any other court.

7. Petitioner was convicted by jury trial of second degree murder with the use of a deadly weapon in Case No. C-89-92060. Petitioner received two consecutive sentences of life with the possibility of parole. Petitioner began serving his sentence on May 16, 1990.
8. Petitioner was represented by the following attorneys in state court:

Pre-trial and Trial: Deputy Public Defenders Victor Austin and Michael Gardner

Appeal: Deputy Public Defender Michael Gardner (brief); Deputy Public Defender Steve Dahl (oral argument).

Post-conviction Petition: Pro Se

Appeal from Denial of Post-conviction relief: Pro Se

FACTUAL SUMMARY

9. Petitioner was charged with killing Alanna Holmes on November 4, 1989. Ms. Holmes died as a result of a shotgun wound. Petitioner admitted, at trial to shooting Ms. Holmes with a shotgun but asserted that the shooting was accidental. Antonio Slack admitted that he shot and was responsible for the death of the decedent Alanna Holmes.

STATEMENT OF PRIOR PROCEEDINGS

10. The Judgment of Conviction-Case No. C89-92060

Petitioner challenges his conviction imposed in Criminal Case No. C89-92960 in the Eighth Judicial District Court for the State of Nevada, in and for the County of Clark. Slack pleaded not guilty and was convicted following a jury trial. Sentence was imposed for second degree murder with the use of a deadly weapon.. Slack was sentenced to the Nevada state prison for a term of life with the possibility of parole (second degree murder) and a consecutive term of life with the possibility of parole (use of a deadly weapon).

11. The Direct Appeal-Nevada Supreme Court Docket No. 21421

An appeal was taken to the Nevada Supreme Court raising the following issues:

Issue One: Whether insufficient evidence was adduced at trial to convict the defendant of second degree murder with use of a deadly weapon?

Issue Two: Whether the trial court improperly allowed prejudicial evidence of a sexual relationship between the defendant and the twelve year old victim?

Issue Three: Whether the reasonable doubt jury instruction given by the trial court violated the due process clause of the United States and Nevada constitution?

Issue Four: Whether the court erred by not adequately defining premeditation in the jury instructions regarding murder?

On September 11, 1991, Deputy Public Defender Steve Dahl argued petitioner's direct appeal before the Nevada Supreme Court. Mr. Dahl did not author the appellate brief. At oral argument, Mr. Dahl indicated that he would present argument only on Issue Two. On November 5, 1991, the Nevada Supreme Court issued an order dismissing the appeal.

12. State Petition for Writ of Habeas Corpus (Post Conviction) Slack v. State of Nevada, Case No.C-92960

On July 10, 1992, petitioner, in proper person, filed a Post Conviction Petition for Writ of Habeas Corpus in the Eighth Judicial District Court. The petition raised the following grounds:

Ground One: Petitioner was denied his Sixth Amendment right to effective assistance of counsel pre-trial and at trial.

Ground Two: Petitioner was denied his Sixth Amendment right to effective assistance of counsel on direct appeal.

Ground Three: The trial court violated petitioner's Sixth and Fourteenth Amendment rights to a fair and impartial trial.

Ground Four: There was prosecutorial misconduct in petitioner's trial that prejudiced petitioner.

The petition for post conviction relief was denied in District Court, Clark County, Nevada on September 2. 1992. A formal order memorializing the court's decision was filed on February 11, 1993.

13. Appeal from order denying state Petition for Habeas Corpus (Post-Conviction) Slack v. State of Nevada, Case No. C-92060.

On December 30, 1993, the Nevada Supreme Court entered an Order dismissing the appeal from the denial of post conviction relief. Exhibit 3.

No. 98-6322

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANTONIO TONTON SLACK, Petitioner

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA, Respondents.

Supreme Court, U.S.
FILED
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APPENDIX FOR PETITION FOR WRIT OF CERTIORARI VOLUME II

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada
*TIMOTHY P. O'TOOLE
Asst. Federal Public Defender
330 S. Third St., #700
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* Counsel for Petitioner

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DISTRICT OF NEVADA
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

Case No. CV-N-95-194-DWH

MEMORANDUM DECISION AND ORDER

Petitioner Antonio T. Slack has submitted a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 attacking the validity of his conviction. Slack asserts seven grounds for relief: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct the jury; (5) he was denied effective assistance of counsel; (6) he was denied effective assistance of appellate counsel; and (7) cumulative error.

Slack previously filed a petition for writ of habeas corpus, case number CV-N-91-561-HDM, in which he alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation

instruction. *See Slack v. Director of Nevada State Prisons*, CV-N-91-561-HDM. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all State remedies.

Respondents have moved to dismiss the instant petition alleging abuse of the writ (#67). Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides that:

> A second or successive petition may be dismissed . . . if new and different grounds are alleged [and] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In the instant petition, grounds two, four (C), five, six and seven were not raised in Slack's previous petition. Therefore, the issue before the court is whether Slack's failure to assert the new ground in his first petition constitutes an abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. To meet their burden, the state must with clarity and particularity note the prior writ history, identify the claims that appear for the first time in the current petition, and allege that petitioner has abused the writ. If the state meets their burden, then petitioner must show (1) cause for not raising the claim in the previous petition, e.g., that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim, and (2) actual prejudice resulting from the errors about which he complains. *Bonin v. Calderon*, 77 F.3d 1155, 1158-59 (9th Cir.1996); *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir.1996).

"Abuse of the writ doctrine examines petitioner's conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition. . . ." *McClesky*, 499 U.S.at 498. An inmate's pro se status does not constitute "an objective external factor" which excuses a petitioner's failure to raise his new claim in prior habeas petitions. *Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir.1992); *Hughes v. Idaho State Board*, 800 F.2d 905, 909 (9th Cir.1986). An inmate's pro se status does not excuse an inmate's ignorance of the law nor establish cause for the purpose of determining whether an inmate abused the writ by failing to raise new claims in prior habeas petitions: there is no constitutional right to counsel in post-conviction proceedings. *Saahir*, 956 F.2d at 118. To show actual prejudice, "petitioner bears 'the burden of showing not merely that the errors at his trial constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension.'" *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) *(quoting United States v. Frady*, 456 U.S. 152, 170 (1982)).

As an alternative to showing "cause and prejudice," Slack may attempt to show that dismissal of his instant claim on abuse of the writ grounds will result in a "fundamental miscarriage of justice." Such a showing, however, is very difficult to make. It requires Slack to demonstrate that he is "actually innocent" of the crime with which he was convicted. *See also Smith v. Murray*, 477 U.S. 527, 537 (1986).

Respondents have met their burden in alleging that Slack has abused the writ. Slack must now establish cause and prejudice for his failure to assert the instant claim in his first petition or he must demonstrate that a fundamental miscarriage of justice will result if the court dismisses the case for abuse of the writ. Given the extreme difficulty of showing a "fundamentally unjust incarceration," this court recommends Slack disregard this alternative test and attempt to show cause and prejudice.

IT IS ORDERED that Slack shall have fifteen (15) days from the date of this order within which to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two , four(C), five, six and seven of the instant amended habeas petition. No extensions of time will be granted.

Dated this 10 day of March, 1998.

UNITED STATES DISTRICT JUDGE

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Attorney for Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, DIRECTOR, NDOP, et al., Respondents.	CV-N-95-194-DWH **MOTION FOR RECONSIDERATION OF MEMORANDUM DECISION AND ORDER ENTERED ON MARCH 11, 1998**

Petitioner, Antonio Slack, by and through his counsel of record, Franny A. Forsman, Federal Public Defender, Deborah A. Trevino, Assistant Federal Defender, respectfully moves this court to reconsider, alter and amend its Memorandum Decision and Order entered March 11, 1998. This motion is made pursuant to Rule 59 of the Federal Rules of Civil Procedure and is based upon the attached memorandum of points and authorities and the entire file in this matter. Petitioner respectfully requests a hearing

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in this matter. Undersigned counsel anticipates approximately thirty minutes for oral argument.

DATED this 25th day of March, 1998.

Respectfully Submitted,

DEBORAH A. TREVINO
Asst. Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The court has entered an order determining that Respondents have met their burden in alleging that petitioner has abused the writ with regard to grounds two, four(C), five and seven of the instant amended petition. On the basis of this determination, the court has ordered petitioner to file points and authorities addressing whether he can overcome the abuse of the writ bar. This motion for reconsideration follows. The court's order is premised upon an error of law which requires correction and reconsideration.

A. The state has not alleged facts sufficient to establish that an abuse of the writ has occurred.

The state argues that Rule 9(b) of the Rules Governing Section 2254 cases requires that the grounds asserted in the amended petition which are unexhausted or were not included in the previous federal petitions should be dismissed under the abuse of the writ doctrine. The state's pleading does not furnish any ground for dismissing any part of the amended petition.

B. The amended petition is not a "second or successive" one under Rule 9(b).

Initially, in order to preserve the question for review, petitioner submits that Rule 9(b) does not apply to his case at all, because the amended petition before the court is not a "second or successive" one within the meaning of the rule, since the previous federal petition was dismissed without prejudice for

exhaustion. Petitioner recognizes that the Court of Appeals has adopted a contrary position. Farmer v. McDaniel, 98 F.3d at 1556-1557. Every other Court of Appeals that has addressed this issue, however, has held that a petition is not subject to Rule 9(b) as a "second or successive" one if previous petitions have been dismissed without prejudice for exhaustion. McWilliams v. State of Colorado, 121 F.3d 573, 575 (10th Cir. 1997); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996); Camarano v. Irvin, 98 F.3d 44, 46-47 (3d Cir. 1996); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997); Woods v. Whitley, 933 F.2d 321, 322 (5th Cir. 1991); Jones v. Estelle, 722 F.2d 159, 168 (5th Cir. 1983) (en banc) cert. denied, 466 U.S. 976 (1984); Dickson v. Maine, 101 F.3d 791, 791 (1st Cir. 1996) (per curiam).

C. The A.E.D.P.A. has superseded Rule 9(b) of the Rules governing § 2254 cases.

This case is governed by the A.E.D.P.A. because it was commenced after April 25, 1996. In Farmer the Ninth Circuit held that Rule 9(b) applies, in limited part, to §2254 actions that had previously been dismissed without prejudice. The A.E.D.P.A. provides that a successor petition cannot be filed with the district court unless a panel of the Court of Appeals authorizes such an action. 28 U.S.C. §2244(b)(3). In a case following the enactment of the A.E.D.P.A. the Ninth Circuit held that previous petitions which have been dismissed without prejudice on exhaustion grounds do not trigger §2244(b)(3). In re Turner, 101 F.3d 1323 (9th Cir. 1997). In other words, a dismissal without

prejudice does not make the next §2254 action a successor petition.

The Court of Appeals for this circuit has created an intra-circuit conflict with Farmer by holding that a "second or successive" petition under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) -- which uses the identical language in 28 U.S.C. §2244(b) that is used in, and was adopted from, Rule 9(b) -- does not refer to a petition filed after a previous petition has been dismissed without prejudice for purposes of exhaustion. In re Turner, supra at p. 323. In order to preserve this issue for review, see Sup. Ct. Rule 10.1(a) (conflicting decisions of Court of Appeals as basis for review on certiorari); Fed. R. App. P., Rule 35(a)(1) (securing uniformity of decision as ground for hearing en banc); petitioner submits that no part of the instant amended petition can be subject to dismissal under Rule 9(b).

This position is also supported by the decision of the Court of Appeals in Calderon v. United States District Court (Taylor), _ F.3d ___, 1998 WL 24138 (9th Cir. January 28, 1998), in which the court held that a district court has discretion to hold the exhausted part of a habeas petition in abeyance while dismissing the unexhausted claims for exhaustion. An amended petition, adding the claims following exhaustion, could not rationally be considered a "second or successive" one under Rule 9(b) because there would be no difference in substance between that situation

and the one presented here where the previous petition was dismissed without prejudice in its entirety.

The Turner decision makes the jurisprudence in this circuit on this issue fundamentally incoherent. It is clear that the AEDPA was intended to, and did, impose restrictions on the filing of "second or successive" habeas corpus petitions in 28 U.S.C. §2244(b) that are more stringent than the preexisting caselaw on abuse of the writ. E.g., Felker v. Turpin, ___ U.S. ___, 116 S.Ct. 2333, 2340 (1996); cf. Schlup v. Delo, 513 U.S. 298 (1995); McCleskey v. Zant, 499 U.S. 467 (1991). Under Turner, however, it does not matter how many previous federal petitions have been dismissed for exhaustion: a new petition under the AEDPA is not a "second or successive" one under 28 U.S.C. §2244(b). Turner and Farmer can be harmonized if this court concludes that the Farmer decision is limited to cases pre-dating the enactment of the A.E.D.P.A. A contrary conclusion ignores the holding in Turner a case more applicable to the instant action because it was controlled by the A.E.D.P.A.

D. There is no basis for finding abuse as a result of presentation of unexhausted claims.

As shown above, the amended petition before this court is fully exhausted. As a result, there is no basis for dismissal, with or without prejudice. The basis for the theory of abuse of the writ in the non-McCleskey context -- that is, when there has been no "first round of federal habeas," McCleskey v. Zant, 499 U.S. at 490 -- is (as originally articulated by the state in this

case) that the petitioner is attempting to evade resolution of his constitutional claims by repeatedly filing mixed petitions, thus avoiding a decision on the merits due to the necessity of dismissal for exhaustion. Petitioner here was not, and has not been, seeking to evade such a resolution. There is accordingly no basis for the state to seek dismissal either for exhaustion or on the basis of abuse.

Petitioner submits that a hearing on that issue is necessary before final resolution of any question involving petitioner's substantial rights.

II. CONCLUSION

For the reasons stated above and in petitioner's opposition to respondents motion to dismiss, petitioner respectfully requests that this Court alter or amend its Memorandum Decision and Order entered on March 11, 1998.

Dated this 25th day of March, 1998.

Respectfully submitted,

Deborah A. Trevino
Assistant Federal Public Defender
Attorney for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	CV-N-95-194-DWH

CERTIFICATE OF MAILING

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 25, 1998, she served a copy of the above and foregoing document by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701

Antonio T. Slack
#31395
Ely State Prison
P.O. Box 1989
Ely, NV 89301

Pamela M. Ramage
Legal Assistant

RECEIVED
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Las Vegas, Nevada

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FRANNY A. FORSMAN
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(702) 388-6577

Attorney for ANTONIO SLACK

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner, v. E.K. McDANIEL et al., Respondents.	CV-N-95-194-DWH NOTICE OF APPEAL

NOTICE is hereby given that Antonio Slack, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment in a civil case dated March 31, 1998.

DATED this 28th day of April, 1998.

JOHN C. LAMBROSE
Asst. Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender and is a person of such age and discretion as to be competent to serve papers.

That on April 28, 1998, she served a copy of the attached NOTICE OF APPEAL by placing a copy in a self addressed envelope postage prepaid to the addressee below:

Julie A. Slabaugh
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

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PO Box 1989
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Pamela M. Ramage
PAMELA M. RAMAGE

Slack -

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Counsel for Petitioner

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Las Vegas, Nevada

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

***

ANTONIO T. SLACK,

Petitioner,

vs.

Director NDOP, et al.,

Respondents.

CV-N-95-194-DWH

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

COMES NOW, petitioner, Antonio T. Slack, and submits this application for a certificate of probable cause.

This application is based on the following points and authorities, as well as the pleadings and papers on file in this case.

Dated this 8th day of May, 1998.

Respectfully submitted,

JOHN C. LAMBROSE
Asst. Federal Public Defender

I. POINTS AND AUTHORITIES

A. Facts

The petitioner commenced this action on March 27, 1995. CR 1. On February 13, 1997 this court appointed counsel. CR 43. Thereafter, the petitioner filed his third amended petition.[1] The respondent moved to dismiss the third amended petition on procedural grounds. Specifically the respondent contended that grounds two, four(C), five, six and seven were abusive and sought a dismissal of those grounds.[2] The respondent did not specifically plead or allege how Slack's previous conduct regarding his federal writ history was indicative of an intent on his part to withhold claims in order to "vex or harass" the respondents or "delay" the final resolution of his federal remedy. Farmer v. McDaniel, 98 F.3d 1548, 1556 (9th Cir. 1996) (citations omitted). Instead, the respondent simply argued that Slack's failure to present the allegedly abusive claims in his previous 1991 § 2254 action resulted in per se abuse. See motion to dismiss at p. 9 ll. 22-28.

The respondent also contended that grounds two, four (C), three, most of five, six and seven were not exhausted and that fact rendered the third amended petition as "mixed" in nature requiring a dismissal of the instant case.[3] The petitioner opposed the motion to dismiss arguing that no ground pled in the third amended petition was abusive. Opposition to Motion to Dismiss. Slack also argued against a dismissal on exhaustion grounds as to any of the claims raised in the petition. Id.

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[1] The grounds raised in Slack's third amended petition are set out in this Court's March 30, 1998 Order at pages 2 and 3. CR. 74.

[2] Slack's third amended petition alleged that grounds two and 4(C) were not exhausted. CR 74.

[3] The respondent did not plead any other procedural defenses. Moreover, although the respondent did not affirmatively seek a dismissal of this case without prejudice it must necessarily be assumed that a dismissal on exhaustion grounds is construed to be without prejudice. This court's order is in accord. CR 74 at p.7.

On March 11, 1998 the court entered an interim order finding grounds two, four(C) , five, six and seven abusive. CR 72. The court's conclusion was predicated on the fact that Slack's third amended petition contained grounds (two, four(c) five, six and seven) that were not pled in Slack's previous federal petition which had been dismissed on exhaustion grounds. Id. At p. 2 (comparing 1991 claims with claims in instant action). Without any further scrutiny of Slack's conduct -- that is without any consideration of whether petitioner had any intent to vex, harass, or delay-- the court concluded that the abusive grounds would be dismissed absent a demonstration of cause and prejudice. Id.. Citing McCleskey v. Zant, 499 U.S. 467 (1991).[4]

On March 26, 1998 Slack asked the court to reconsider its decision arguing that: (1) the respondent failed to allege sufficient facts to support an abuse of the writ; (2) Slack's third amended petition was not a "second or successive petition"; (3) abuse of the writ is inapposite to this case because the claims alleged in the third amended petition cannot be dismissed on exhaustion grounds. Motion to reconsider, filed March 26, 1998.[5]

On April 2, 1998 this court entered an order dismissing the action without prejudice. CR 74. The court concluded that grounds two, four(C), five, six and seven were abusive and dismissed those grounds accordingly. Id. This court did not resolve the respondent's exhaustion argument on these claims. The court did not discuss how Slack's previous federal writ history warranted such a harsh sanction. It simply adopted the respondent's position that Slack's failure to plead the claims in his 1991 petition was a per se abuse of the writ. CR 72. Finally, the court found that ground three was unexhausted and that

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[4] The court did not address Slack's argument that the McCleskey standard could not apply in this case. See Opposition to motion to dismiss.

[5] Slack had previously argued that the court could not dismiss any of the grounds under the exhaustion doctrine but the court's March 11, 1998 order did not resolve that issue.

fact rendered the petition "mixed" in nature requiring a dismissal of the instant action without prejudice. Id.

B. The amendments to § 2253 do not apply to cases filed prior to the AEDPA's effective date.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, signed into law on April 24, 1996, enacted the present 28 U.S.C.A. § 2253 (Supp. 1997, requiring a "certificate of appealability" in order for an appeal to be taken from a final order in a habeas proceeding. See 28 U.S.C.A. § 2253(b) (requiring " substantial showing of the denial of a constitutional right"). Prior to the enactment of the AEDPA, § 2253 required a "certificate of probable cause" in order for an appeal to be taken from a final order in a habeas proceeding. See 28 U.S.C.A. § 2253 (1994).

The portions of the AEDPA which apply to non-capital cases have been held to be inapplicable to cases already pending when the Act was passed. Lindh v. Murphy, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (the portions of § 2254(d) dealing with noncapital cases are inapplicable to cases already pending when the Act was passed); Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997) (the AEDPA does not apply retroactively to cases filed in federal courts in Ninth Circuit prior to Act's effective date).

Slack filed his petition on May 30, 1995, well before the date the AEDPA was passed (April 24, 1996). CR 4. Accordingly, his case is governed by the pre-Act version of § 2253 (requiring a certificate of probable cause). The amendments to § 2253 promulgated by the AEDPA cannot apply retroactively to Slack's cases. See Lindh, and Jeffries, see also Greenwalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997) (applying "certificate of probable cause" standard to dismissal of petition filed April 23, 1996).

C. Slack is entitled to a certificate of probable cause.

As shown above, however, the AEDPA does not apply to this matter. A CPC is appropriate where a petitioner can show a "substantial showing of the denial of a federal right." Lynch v. Blodgett, 999 F.2d 401, 403 (9th Cir. 1993) (quoting Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394-95, 77 L.Ed.2 1090) (1993)). To satisfy the "substantial showing" standard, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot, 463 U.S. at 893 n.4, 103 S.Ct. At 3395 n.4 (citations omitted).

1. It is at least debatable among jurists of reason that this court erred when it concluded that grounds two, four(C), five, six and seven were abusive.

a. The amended petition is not a "second or successive" one under Rule 9(b).

Initially, in order to preserve the question for review, petitioner submits that Rule 9(b) does not apply to his case at all, because the amended petition before the court is not a "second or successive" one within the meaning of the rule, since the previous federal petitions were dismissed without prejudice for exhaustion. Petitioner recognizes of course that the Court of Appeals has adopted a contrary position. Farmer v. McDaniel, 98 F.3d at 1556-1557. See also, Motion for Reconsideration at p. 3, filed March 26, 1998. Every other Court of Appeals that has addressed this issue, however, has held that a petition is not subject to Rule 9(b) as a "second or successive" one if previous petitions have been dismissed without prejudice for exhaustion. McWilliams v. State of Colorado, 121 F.3d 573, 575 (10th Cir. 1997); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996); Camarano v. Irvin, 98 F.3d 44, 46-47 (3d Cir. 1996); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997); Woods v. Whitley, 933 F.2d 321, 322 (5th Cir. 1991); Jones v. Estelle, 722 F.2d 159, 168 (5th Cir. 1983) (en banc) cert. denied, 466 U.S. 976 (1984); Dickson

v. Maine, 101 F.3d 791, 791 (1st Cir. 1996) (per curiam). In fact, the Court of Appeals for this circuit has created an intra-circuit conflict with Farmer by holding that a "second or successive" petition under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) -- which uses the identical language in 28 U.S.C. §2244(b) that is used in, and was adopted from, Rule 9(b) -- does not refer to a petition filed after a previous petition has been dismissed without prejudice for purposes of exhaustion. In re Turner, 101 F.3d 1323, 1323 (9th Cir. 1997). Further, the Supreme Court's intervening decision in Calderon v. Thompson, ___ U.S. ____, 1998 WL 204593 (U.S.) treats the definition of a "second or successive" petition as settled, referring only to petitions filed after a previous petition has been addressed on the merits. That decision undercuts the decision in Farmer and this court should not follow the Farmer definition of "second or successive" petition. In any event, in order to preserve this issue for review, see Sup. Ct. Rule 10.1(a) (conflicting decisions of Court of Appeals as basis for review on certiorari); Fed. R. App. P., Rule 35(a)(1) (securing uniformity of decision as ground for hearing en banc); petitioner submits that no part of the instant amended petition can be subject to dismissal under Rule 9(b) at all.[6]

The Turner decision makes the jurisprudence in this circuit on this issue fundamentally incoherent. It is clear that the AEDPA was intended to, and did, impose restrictions on the filing of "second or successive" habeas corpus petitions in 28 U.S.C. §2244(b) that are more stringent than the preexisting caselaw on abuse of the writ. E.g., Felker v. Turpin, _ U.S. __, 116 S.Ct. 2333, 2340 (1996); cf. Schlup v. Delo, 513 U.S. 298 (1995); McCleskey v. Zant, 499 U.S.

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[6]This position is also supported by the decision of the Court of Appeals in Calderon v. United States District Court (Taylor), 134 F.3d 981 (9th Cir. 1998), in which the court held that a district court has discretion to hold the exhausted part of a habeas petition in abeyance while dismissing the unexhausted claims for exhaustion. An amended petition, adding the claims following exhaustion, could not rationally be considered a "second or successive" one under Rule 9(b); but there would be no difference in substance between that situation and the one presented here where the previous petitions was dismissed without prejudice in their entirety. Moreover, the petitioner's case is bolstered by the fact that he sought a stay in his earlier federal proceeding which was certainly appropriate under the then-existing rule in the Ninth Circuit. See Exh. B at tab 5; see also Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988).

467 (1991). Under Turner, however, it does not matter how many previous federal petitions have been dismissed for exhaustion: a new petition under the AEDPA is not a "second or successive" one under 28 U.S.C. §2244(b). Under the Court of Appeals' decision in Farmer, however, a petition can be treated as a "second or successive" one under the less stringent, pre-AEDPA law, and thus abuse could allegedly be found although it could not even be considered under current law.

b. Abuse of the writ does not apply to this case.

In dismissing the above grounds this court relied on the rule announced in Farmer v. McDaniel, supra. In Farmer, the Ninth Circuit held that in very limited circumstances a particular claim pled in § 2254 petition can be dismissed even though the petitioner's previous § 2254 action had been dismissed without prejudice. Id. at p. 1560. The holding in Farmer does not apply to this case for several reasons. First, Farmer's previous federal writ history included three previous petitions spanning a period of nearly eight years. Id. At pp. 1549-1551. Slack, on the other hand, filed only one previous federal petition.[7] Second, Farmer was represented by counsel in each of his previous forays into federal court. Id. At p. 1348-1350. Slack's previous federal petition was litigated pro se. Id. Third, Farmer's previous federal litigation resulted in a more significant expenditure of federal judicial resources. Slack's previous federal petition was filed on November 27, 1991 and dismissed without prejudice less than ninety days later. See, Exh. A, Slack v. Director, CV-N-91-561-HDM at CR 1. The only "litigation" during that brief period of time involved the respondent's motion for extension of time (CR 4) to respond to the court's December 10, 1991 order directing that a response to the petition be filed no later than December 27, 1991. CR 3. On February 5, 1992 (five days prior to the respondent's new deadline) the petitioner asked to have the action held in abeyance while he returned to state court to exhaust his

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[7]The previous federal file is attached to these points and authorities at Exh. A.

claims. CR 5. The court, instead, opted to dismiss the action without prejudice. CR 7. This occurred on February 19, 1992 and on July 10, 1992 Slack filed his state post-conviction petition. The final, and most compelling difference between Slack's procedural history and the history outlined in Farmer is that Slack was never admonished, in any written order, that the failure to present all of his known claims for relief could result in a bar of those claims in a later federal action. Compare Exhibit A with 98 F.3d at p. 1550 n. 2.

The Ninth Circuit's decision in, Farmer, is explicitly very limited in scope. The court observed as much in three different sections of the opinion. 98 F.3d at p. 1549, 1554, and 1560. In Farmer the Ninth Circuit distilled its very narrow holding as follows:

> In short, what we hold, and all that we hold, is that the district court was not precluded as a matter of law from considering whether Farmer's conduct in failing to allege grounds in prior petitions that he alleged the third time around (if he did) was abusive solely on account of the fact that his prior petitions were not reviewed on the merits.

Id. at p. 1560 (emphasis supplied). The Ninth Circuit then remanded the case to the district court in order to determine whether Farmer's amended petition in his third federal §2254 action contained abusive grounds for relief. Id. However, the Court was careful to note that the fact that a previous federal petition was not reviewed on the merits is "an important factor that informs the court's discretion in applying the abuse of the writ doctrine." Id. At p. 1549. It is not dispositive and cannot, standing alone, end the inquiry. Slack's procedural history does not match the Farmer case nor does it bear any similarity other than Slack had a previous § 2254 petition dismissed without prejudice because it contained unexhausted claims. This court's per se finding of abuse in Slack's case is contrary to Farmer's admonition that before such a conclusion can be reached a thorough inspection of the previous writ history is mandated so the court's exercise of discretion is "informed". Id.

Abuse of the writ as a procedural bar, focuses on the conduct and motive of the

petitioner relative to his previous federal § 2254 litigation. "Abuse of the writ doctrine examines petitioner's conduct. The question is whether petitioner possesses, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter throughout the habeas process." 98 F.3d at 1560, quoting McCleskey v. Zant, 499 U.S. 467, 498 (1991) (emphasis in original). This court can take judicial notice of the fact that at least one judge in the federal district of Nevada is in accord with this interpretation of Farmer. See, Duckett v. Godinez, 67 F.3d 734, 741 (9th Cir. 1995) (observing that a court can take judicial notice of other state or federal proceedings). In Pellegrini v. McDaniel case no. CV-S- 96-400 PMP(LRL), the district court was asked to find several of the petitioner's claims abusive because they were not presented in a previous federal petition. The court refused and predicated its decision on the fact that the previous action was litigated pro se, lasted less than four months, was filed in order to obtain a stay of execution, and was ultimately dismissed without prejudice. See exhibit B attached hereto.

c. If abuse of the writ applies to this case the respondent did not demonstrate that an abuse was committed.

This court concluded that abuse has been established as a matter of law because of the existence of a previous federal petition that was dismissed for exhaustion. This court relied, in part, on McCleskey. Petitioner submits that McCleskey overruled Sanders v. United States, 373 U.S. 1 (1963), only with respect to cases in which there has been a "first round of federal habeas," McCleskey, 499 U.S. at 490, and that Sanders states the applicable standard of abuse in non-McCleskey situations. This position is consistent with the decision of the Court of Appeals in Farmer. The court did not reach the question whether any of the claims in the amended petition were new, "or if they are, whether there has been any abuse of the writ. That is entirely for the district court to decide, in its discretion." Farmer, 98 F.3d at 1460 (footnote omitted). If the McCleskey standard of abuse applied in this situation, the Court of Appeals would have had no

reason to reserve the question of abuse: any new claim would be abusive and the only issue would be whether petitioner could establish an excuse. There would also be no occasion for this court to exercise its discretion: if a new claim in a petition filed after the dismissal of previous petitions for exhaustion were subjected to the McCleskey standard, abuse would be demonstrated, as a matter of law, not as a matter of discretion.

Petitioner submits that the standard for establishing abuse in the non-McCleskey context remains the standard of Sanders. This court's conclusion that McCleskey overruled Sanders in toto -- without any analysis and sub silentio -- is simply not credible, in light of the undisputed fact that the Rule 9(b) codification of Sanders remains in effect for pre-AEDPA cases. See Lonchar v. Thomas, ___ U.S. ___, 115 S.Ct. 1293 (1996) (federal courts should not impose procedural requirements beyond those incorporated in habeas rules). It is equally impossible to conclude, in light of the emphasis placed in McCleskey on the costs of repetitive federal review of state convictions, that the McCleskey decision -- again sub silentio -- intended to erase all distinctions for abuse purposes between successor petitions filed after a complete round of federal habeas corpus review and petitions filed after a previous petition has been dismissed "without prejudice" for exhaustion and no federal review at all has occurred. Nothing in the Farmer or McCleskey decisions supports so radical a departure from prior law; and such a departure from previous law would not be consistent with the "evolutionary process" of abuse of the writ jurisprudence, see Felker v. Turpin, _ U.S. __, 116 S.Ct. 2333, 2340 (1996), but would be a quantum leap of logic.[8]

It is clear that McCleskey abuse does not apply in this case, because there was no prior

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[8]The per se rule could lead to truly surreal results. For example, a petitioner could file an amended petition as of right, under Fed. R. Civ. P., Rule 15(a); and the court could be forced by the state to conduct abuse of the writ analysis for failure to include claims in the initial petition which is superseded by the "second or successive" amended petition. In short, every amendment to every petition would be subjected to the same kind of abuse analysis that would be conducted if the petitioner had already received a complete round of federal court review of the claims on the merits in a first petition. Nothing in the Supreme Court's jurisprudence suggests so irrational a result.

determination of the merits. The second type of abuse may arise under the circumstances suggested by Sanders, upon which Rule 9(b) is based. This type of abuse requires a showing that a new claim in a petition was "deliberately withheld" from a previous petition, former 28 U.S.C. § 2244(b); Sanders, 373 U.S. at 18, or that the petitioner "deliberately abandon[ed]" the claim in a hearing on a previous petition, id., citing Wong Doo v. United States, 265 U.S. 239, 241 (1924); or that the "only purpose" of the petition is "to vex, harass or delay," Sanders, 373 U.S. at 18; or that the petitioner is deliberately engaging in needless piecemeal litigation. Sanders, 373 U.S. at 18.

The Farmer decision explicitly acknowledged the continuing validity of these standards for non-McCleskey abuse:

> A federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner (1) made a conscious decision deliberately to withhold them from a prior petition, (2) is pursuing needless piecemeal litigation, or (3) has raised the claims only to vex, harass, or delay. Where there is no affirmative indication in the record that the petitioner made a conscious decision deliberately to withhold his claim, proceed by piecemeal litigation, to vex or harass or annoy the court or the state, a second petition raising a new claim is not an abuse of the writ.
>
> The state has presented no evidence that any of the factors outlined in *Sanders* are present. Moreover, there is nothing in the history of this case to indicate that Hamilton deliberately withheld his claim in the hope of being granted two hearings instead of one.

Farmer, 98 F.3d at 1559, quoting Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989) (citations omitted).

This analysis of Sanders abuse is the only one that fits into the text and structure of the applicable statutes and rules. The Farmer decision emphasized the language of Rule 9(b) in concluding that abuse of the writ could be found, even if no prior proceeding on the merits of a previous petition had been conducted, relying on the language "[a] second or successive petition may be dismissed . . . if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Farmer,

98 F.3d at 1555. The Advisory Committee Notes (1976) to Rule 9(b), quoted in Farmer, explicitly adopt the Sanders analysis of the standard of abuse under this theory:

> With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in Sanders noted:
>
> In either case, full consideration of the merits of the new application can be avoided [only] if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.
>
> 373 U.S. at 17-18 [83 S.Ct. at 1078]

Farmer, 98 F.3d at 1555-1556. The Notes conclude that Rule 9(b) will not "eliminate a remedy to which the petitioner is rightfully entitled," and emphasize the language of Sanders holding that

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.
>
> 373 U.S. at 19 [83 S.Ct. at 1078].

Farmer, 98 F.3d at 1556.

Thus the non-McCleskey prong of Rule 9(b) incorporates the Sanders standards of abuse, as the Advisory Committee Notes clearly indicate. This conclusion is also the only one consistent with the settled principle of statutory construction that an enactment which employs a term of art (like "abuse of the writ") which has been judicially defined is presumed to have incorporated the judicial interpretation of the term. E.g., McDermott Intern., Inc. v. Wilander, 498 U.S. 337, 342 (1991); Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 813 (1989).

...

...

...

2. It is at least debatable among jurists of reason that this court erred when it concluded that ground three was not exhausted.

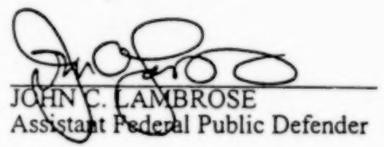
Ground three of the amended petition challenges the constitutionality of the use of evidence of sexual misconduct designed to prejudice the jury. Here, respondent argues that ground three is unexhausted because the claim was not presented as a violation of Slack's Fifth and Fourteenth Amendments. The record belies that assertion. That Slack's right to due process is impinged by this violation of his right to a fair trial cannot come as surprise to the state. It is clear that the analysis employed at the appellate level inherently implicated due process and fair trial claims. The "unexhausted claims" upon which respondent relies cannot reasonably be said to have fundamentally altered the legal claim of prosecutorial misconduct or to reflect an attempt by petitioner to withhold facts or legal theory from the state courts. Petitioner's attempts to state as many specifics as possible underlying his claim of prosecutorial misconduct can hardly be said under the circumstances to have caused the claim to become unexhausted.

Moreover, the exhaustion doctrine does not require that a federal habeas corpus petitioner frame a claim in precisely the same manner in which it was set forth in the state court pleadings. See Williams v. Holbrook, 691 F.2d 3, 6 (1st Cir. 1982) (petitioner "not precluded from some reformulation of the claims . . . made in the state courts"). Respondent must not be allowed to extrapolate Slack's claims to the point of requiring that the federal petition be identical to the prior state petitions. See Engle v. Isaac, 456 U.S. 107, 123-124 n.25 (1982) ("a creative appellate judge could almost always distill an unexhausted due process claim . . . [W]e are reluctant to interpolate an unexhausted claim not directly presented by the petition. Rose v. Lundy does not compel such harsh treatment of habeas petitions."). Thus, although respondent has attempted to "mix" Slack's petition, see Lacey v. Gabriel, 732 F.2d 7, 11-12 (1st Cir.) ("district court [could not] 'mix' Lacy's petition for him."), cert. denied, 469 U.S. 861 (1984), the rule requiring liberal construction of prisoners' pleadings should not be applied to Slack's disadvantage.

II. CONCLUSION

For the reasons stated Slack respectfully asks this Court for an order granting a certificate of probable cause.

Respectfully submitted,



JOHN C. LAMBROSE
Assistant Federal Public Defender

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK Petitioner, -vs- E.K. McDANIEL, et al., Respondents.	CV-N 95-194-DWH

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on May 8, 1998, she served a copy of the above and foregoing document by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh Deputy Attorney General Criminal Justice Division 100 North Carson Street Carson City, NV 89701-4717	Antonio Slack #3395 Ely State Prison P.O. Box 1989 Ely, NV 89301

District	Off.	Docket No. Yr.	Docket No. Number	OR	Filing Date Mo.	Filing Date Day	Filing Date Yr.	J	Nature Suit	B 23	Judge	Mag.	Jury Dem	ARB	MDL Docket	Docket Yr.	Docket Number
0978	3	91	00561	1	11	27	91	3	530		7809					91	00561EDM

CLOSED

CAUSE: HABEAS CORPUS - 28 USC 2254

PETITIONER	RESPONDENT
SLACK, ANTONIO T.	DIRECTOR, NEVADA DEPARTMENT OF PRISONS

EXEMPT FRCP 16(b)

ATTORNEYS

FOR PETITIONER:

Antonio T. Slack
Inmate #31395
IN PRO PER
Ely State Prison
P.O. Box 1989
Ely, NV 89301-1989

FOR RESPONDENT:

ATTORNEY GENERAL STATE OF NEVADA
HEROES MEMORIAL BUILDING
CAPITOL COMPLEX
CARSON CITY, NV 89710
KEVIN G. HIGGINS, Deputy
(702) 687-3529
For Rs.

[X] CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL REPORTS PROCESSED
	DATE	RECEIPT NUMBER	C.D. NUMBER	Filing _____
				Termination _____
				Change _____

UNITED STATES DISTRICT COURT DOCKET

DC-111S (7/88)

DATE	NR.	CV-N-91-561-HDM ANTONIO TONTPROCEEDINGS v. DIRECTOR, NV DEPT OF PRISONS
11/27/91	1	PETITION for Writ of H/C obo P. (AT) mj
--	2	MOTION/ORDER: (HDM) ORD tht P may proceed in F/P; Clk shl file petn & shl srv Rs by cert mail; Rs shl not hv to answr ad petn unless crt ords. Cps dist 12/02/91. mj
--	--	JS-5 (AT) mj
12/02/91	-	SUBD TO HDM: (ITEM #1 - Does he wish to have a respns filed?) (AT) mj
12/10/91	3	ORDER TO SHOW CAUSE: (HDM) ORD tht Clk of Crt forward cpys of petn & this Ord to the AG of St of NV and to R, Dir NV Dept of Prisons; FUR ORD tht Rs shl file a respns to the petn on/or before 12/27/91 on the merits of the petn; Rs shl srv a cpy of the respn upon the petnr; FUR ORD tht if any pldng/or paper submitted to be fld & considr by Crt does not include a cert of svc upon rs or Cnsl for Rs, it will not be considrd by the Crt & will be retnd to petnr. Cps dist 12/11/91 (AT) mj
12/20/91	4	MOTION/ORDER: (HDM) ORD tht Rs shl hv ext to & incl 2/10/92 w/in to answr or otherwise plead to the petn for writ of H/C; FUR ORD tht no fur ext of time shl be grntd. Cps dist 12/23/91. (AT) mj
2/5/92	5	MOTION to stay H/C proceedngs obo P. (m) (AT) mj
2/12/92	--	SUBD TO HDM: (ITEM #3 - no respns & #5) (AT) mj
2/18/92	6	MINUTE ORDER (HDM): ORD that P's mtn to stay H/C procdgs (#5) for for hrg 2/19/92 @ 8:45 a.m.; cnsl for Rs sh arrange for telephonic presence of P (cps dist) (AT). rm
2/20/92	7	MINUTE ORDER (HDM): ORD this actn dism w/o prejudice; P grntd lv to file application to renew upon exhaustion of all state remedies. (cps dist) (AT) rm.
---	--	JS-6. (AT) rm

RECEIVED
NOV 15 1991
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK
Name

31395
Prison Number

ELY STATE PRISON
Place of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK, Petitioner
(Full Name)

vs.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS, Respondent
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.)

and

The Attorney General of the State of NEVADA, Additional Respondent.

(NOTE: If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment of conviction was entered.)

CV-N----91-561-H

CASE NO. (To be supplied by the Clerk)

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254 BY A PERSON IN STATE CUSTODY

1) Name and location of the court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, LAS VEGAS, NEVADA

2) Date judgment of conviction was entered: MAY 1990

3) Case number: C92060.

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5-YEARS-TO-LIFE SENTENCES

a) In a capital case where death penalty has been imposed, date of scheduled execution NOT APPLICABLE

5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

Yes ☐ No ☒

6) Nature of the offense involved: (all counts)

SECOND DEGREE MURDER WITH USE OF DEADLY WEAPON

7) What was your plea? (check one)

a) Not Guilty ☒ b) Guilty ☐ c) Nolo Contendere ☐

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement:

NOT APPLICABLE

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

a) A jury ☒ b) A judge without a jury ☐

10) Did you testify at trial (if any)? Yes ☒ No ☐

11) Did you appeal from the judgment of conviction?

Yes ☒ No ☐

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NEVADA SUPREME COURT NO. 21421 DISMISSED APPROX. OCT/NOV
PETITIONER DOES NOT POSSESS FINAL ORDER AT THIS TIME

13) If you did not appeal, explain briefly why you did not: _____

DID APPEAL / NOT APPLICABLE

a) Did you seek permission to file a late appeal?

Yes /___/ No /XXX/ WASN'T NECESSARY

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT THE DEFENDANT WITH SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

INCIDENT INVOLVED ACCIDENTAL SHOOTING, TESTIMONY SUPPORTS SAME, CONVICTION ON SECOND DEGREE MURDER IS WITHOUT ESSENTIAL ELEMENTS OF OFFENSE FOR SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON, INTENT AND POSSESSION OF WEAPON LACKING FACTUAL EVIDENCE OR TESTIMONY. ALSO SEE PETITIONER'S OPENING BRIEF FROM STATE COURT DIRECT APPEAL ON THIS CLAIM WHICH WAS CONSTITUTIONALLY RAISED ON BASIS OF JACKSON V. VIRGINIA, 443 U.S. 307 (1979).

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes /XXX/ No /___/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /___/ No /XXXX/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /___/ No /___/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /___/ No /___/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /___/ No /___/, N/A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSU.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSUE

B)(1) Ground Two: THE TRIAL COURT IMPROPERLY ALLOWED PREJUDICIAL EVIDENCE OF A SEXUAL RELATIONSHIP BETWEEN THE DEFENDANT AND THE TWELVE YEAR OLD VICTIM.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

EVIDENCE OF PRIOR BAD ACTS AND UNCHARGED MISCONDUCT VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER FOURTEENTH AMENDMENT AS FURTHER ARGUED IN THE DIRECT APPEAL, SEE ALSO DEFENDANT'S OPEN ING BRIEF IN STATE DIRECT APPEAL.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXXX/ No /__/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /__/ No /XXX/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /__/ No /__/, N and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT RULED ON ISSUE EXHAUSTING REMEDIES

C)(1) Ground Three: THE REASONABLE DOUBT INSTRUCTION TO JURY BY TRIAL COURT VIOLATED DUE PROCESS CLAUSE OF U.S. AND STATE CONSTITUTION (CAGE VS. LOUISIANA)

GROUND FOUR: TRIAL COURT ERRED BY NOT ADEQUATELY DEFINING PREMEDITATION IN JURY INSTRUCTIONS REGARDING MURDER.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

GROUND THREE: REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS CLAUSE OF BOTH THE U.S. AND NEVADA CONSTITUTIONS, SEE CAGE V. LOUISIANA, 111 S. CT. 328 (1990).

GROUND FOUR: TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS AS SHOWN IN DEFENDANT'S STATE COURT SUPREME COURT DIRECT APPEAL OPENING BRIEF (UNITED STATES V. GILBREATH, 452 F. 2d 992, 5th CIR. 1971), BY FAILING TO ADEQUATELY DEFINE "PREMEDITATION" IN JURY INSTRUCTIO

(3) Statement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXXX No /__/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /__/ No XXXX

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /__/ No /__/, N and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes /XXXX No /___/

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them: NOT APPLICABLE

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes /___/ No /XXXX/ If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: NOT APPLICABLE

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack? Yes /XXXX/ No /___/. If "Yes", state the name of the court and the nature of the proceeding: NOT APPLICABLE

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction? Yes/XXXX/ No /___/. If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you were so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: FROM ARRAIGNMENT THRU TRIAL= MICHAEL GARDNER DEPUTY CLARK COUNTY PU ON DIRECT APPEAL = SAME COUNSEL ABOVE (MICHAEL GARDNER, DEP.P.D.)

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

REQUESTED 18 USC £ 3006A-a
Signature of Attorney (if any)

/Antonio J. Kuck
Signature of Petitioner

(Attorney's full address and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at ELY, NEVADA (Location) on NOVEMBER 12, (Date), 1991

/Antonio J. Kuck
(Signature)

2

MOTION AND ORDER UNAVAILABLE

3

CAROL C. FITZGERALD
CLERK
BY _____ DEPUTY

DEC 10 4 23 PM '91

RECEIVED
AND FILED

1991

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK,

Petitioner,

v.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS and THE ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

CV-N-91-561-HDM

ORDER TO SHOW CAUSE

Petitioner is in state custody, having been sentenced in May 1990. Based on the petition filed herein, and good cause appearing:

It is hereby ORDERED that the clerk of the court forward copies of said petition in this order to the Attorney General of the State of Nevada and to the respondent, Director, Nevada Department of Prisons.

It is further ORDERED that the respondents file a response to the petition on or before the 27th day of December, 1991, on the merits of the petition. Respondents shall serve a copy of the response upon Petitioner.

/ / /

It is further ORDERED that if any pleading or other paper submitted to be filed and considered by the court does not include a certificate of service upon Respondents or counsel for Respondents, it will not be considered by the court, and it will be returned to the petitioner.

Dated this 9th day of December, 1991.

UNITED STATES DISTRICT JUDGE

DEC 26 1991
OFFICE OF THE ATTORNEY GENERAL
U.S. DISTRICT COURT
DISTRICT OF NEVADA
DEC 26 199
ATTORNEY
DEC 20 1991
CAROL C. FITZGERALD, CLERK
BY DEPUTY
RECEIVED
DEC 19 1991
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
DEPUTY

FRANKIE SUE DEL PAPA
Attorney General
KEVIN G. HIGGINS
Senior Deputy Attorney General
Criminal Justice Division
Capitol Complex
Heroes' Memorial Building
Carson City, Nevada 89710
Telephone: (702) 687-3529

Attorney for Respondents.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ANTONIO TONTON SLACK, Petitioner, vs. DIRECTOR, NDOP, et al., Respondents.	Case No. CV-N-91-561-HDM MOTION FOR ENLARGEMENT OF TIME (FIRST REQUEST)

Respondents, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, hereby respectfully move this court for an order granting a forty-five (45) day enlargement of time to and including February 10, 1992, in which to file and serve their response to petitioner's Petition for Writ of Habeas Corpus.

This motion is based upon the provisions of Rule 6(b) of the Federal Rules of Civil Procedure and the attached affidavit of counsel as well as all other papers, documents, records, pleadings and other materials on file herein.

. . .

. . .

There have been no prior enlargements of respondents' time to file said response, and this motion is made in good faith and not for the purposes of delay.

RESPECTFULLY SUBMITTED this 18th day of December, 1991.

FRANKIE SUE DEL PAPA
Attorney General

By: for Kevin G. Higgins
Senior Deputy Attorney General
Criminal Justice Division

THERE SHALL BE NO FURTHER EXTENSIONS GRANTED.

IT IS SO ORDERED:

UNITED STATES DISTRICT JUDGE

DATED: December 19, 1991

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 18th day of December, 1991, I served a copy of the foregoing MOTION FOR ENLARGEMENT OF TIME together with the AFFIDAVIT OF COUNSEL, by mailing a copy thereof to:

ANTONIO TONTON SLACK, #31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

5

ANTONIO TONTON SLACK
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Petitioner In Pro Se

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * *

ANTONIO TONTON SLACK,

Petitioner,

DIRECTOR, NDOP, et al.,

Respondents. /

Case No. CV-N-91-561-HDM

MOTION TO STAY THESE HABEAS PROCEEDINGS

COMES NOW, petitioner, ANTONIO T. SLACK, in pro se and with the assistance of an inmate law clerk, MICHAEL R. EVANS #26022, to respectfully move this Honorable Court for an order staying these habeas proceedings until this petitioner has exhausted the following issues in a state court proceeding, pursuant to Rose v. Lundy, 455 U.S. 509 (1982) and Harris v. Reed, 109 S.Ct. 1038 (1989):

1) Ineffective assistance of counsel during all pretrial and trial proceedings as follows:

a) Failure to raise a Franklin violation, in that the deal made with petitioner's co-defendant was not completed before his testimony was allowed;

b) That counsel failed to offer and/or request an accomplice and/or informant instruction.

2) That the trial court erred in not instructing the jury on an accomplice instruction and his testimony.

3) That the trial court erred in allowing the petitioner's co-defendant to testify prior to the deal being made with him and the state being completed.

4) That there was prosecutorial misconduct, in that the prosecution withheld from the jury the fact that the only finger prints found on the murder weapon were those of the co-defendant's.

Petitioner respectfully request one (1) year to litigate these issues in a state court proceeding so that he may present these issues with the issues that he has already presented in his filed habeas.

Dated this 31st day of January, 1992.

respectfully submitted by,

Antonio T. Slack
ANTONIO TONTON SLACK

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 31 day of January, 1992, that I placed a true and correct copy of the foregoing motion in the United States mail, postage prepaid, addressed as follows: Frankie Sue Del Papa, Nevada Attorney General, Capitol Complex, Carson City, Nevada 89710.

Antonio T. Slack
ANTONIO TONTON SLACK
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Petitioner In Pro Se

/ / / / /

/ / / / /

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * *

ANTONIO TONTON SLACK,
Petitioner,

vs.

DIRECTOR, NDOP, et al.,
Respondents. /

Case No. CV-N-91-561-HDM

PURPOSED ORDER

After reading the petitioner's motion to stay these habeas proceedings and good cause appearing,

IT IS HEREBY ORDERED that these proceedings are stayed for a period of one (1) year or until the parties notify this court otherwise.

IT IS SO ORDERED.

Dated this _____ day of _____, 1992.

UNITED STATES DISTRICT JUDGE

/ / / / /

/ / / / /

/ / / / /

6

U.S. DISTRICT COURT
DISTRICT OF NEVADA
FILED
FEB 18 1992
CAROL C. FITZGERALD, CLERK
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ANTONIO TONTON SLACK, Petitioner(s), vs. DIRECTOR, NEVADA DEPARTMENT OF PRISONS, et al., Respondent(s).	CV-N-91-561-HDM MINUTES OF THE COURT February 18, 1992

PRESENT: HONORABLE HOWARD D. McKIBBEN, U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart Reporter/Recorder: None Appearing

Counsel for Petitioner(s): None Appearing

Counsel for Respondent(s): None Appearing

MINUTE ORDER IN CHAMBERS:

Petitioner's Motion to Stay Habeas Proceedings (#5), filed February 5, 1992, is set for telephonic hearing on Wednesday, February 19, 1992, at 8:45 a.m. Counsel for respondents shall arrange for telephonic presence of petitioner.

IT IS SO ORDERED.

CAROL C. FITZGERALD, CLERK

By: Bette Stewart
Deputy Clerk

FILED
Feb 20 7 22 AM '92
RECEIVED
CAROL C. FITZGERALD
CLERK
BY
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ANTONIO TONTON SLACK, Plaintiff(s), vs. DIRECTOR, NEVADA DEPARTMENT OF PRISONS, et al., Defendant(s).	)	CV-N-91-561-HDM MINUTES OF THE COURT February 19, 1992

PRESENT: HONORABLE HOWARD D. McKIBBEN, U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart Reporter/Recorder: Donna Casey

Counsel for Plaintiff(s): Antonio Tonton Slack, in Pro Se

Counsel for Defendant(s): Kevin G. Higgins

PROCEEDINGS: Telephonic Hearing on Petitioner's Motion to Stay Habeas Proceedings (#5)

9:10 a.m. Court convenes.

Court and counsel confer.

There being no objection by either party,

IT IS ORDERED that this action is dismissed without prejudice. Petitioner is granted leave to file an application to renew upon exhaustion of all State remedies.

9:15 a.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By: Bette Stewart
Deputy Clerk

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APR 17 1998
Federal Public Defender
Las Vegas, Nevada

ENTERED AND SERVED
APR 17 1998
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAVID MICHAEL PELLEGRINI,

Petitioner,

vs

E.K. McDANIEL, et al.,

Respondents

Case No. CV-S-96-400-PMP(LRL)

ORDER

Respondents have filed a motion to dismiss (#44) the amended petition for writ of habeas corpus (#43), in which Petitioner Pellegrini challenges the validity of his state court conviction and death sentence. Respondents contend that based on *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), nearly all of the grounds for relief stated in the amended petition are barred from review as an abuse of the writ. Respondents have properly stated the procedural history which shows that Petitioner had a prior federal habeas corpus action that was dismissed for procedural reasons, to-wit: *Pellegrini v. Whitley*, CV-S-89-246-PMP. The decision in *Farmer* holds that abuse of the writ analysis is not precluded when a prior federal habeas corpus proceeding is dismissed for procedural reasons, as compared to a denial on the merits. However, for the reasons stated below, Petitioner's prior action simply cannot be a basis for a finding of abuse of the writ. Hence, the motion to dismiss shall be denied. Although Petitioner's opposition to the motion was filed late, the opposition shall be allowed.

Petitioner's conviction and sentence became final when the Nevada Supreme Court issued its remittitur on December 20, 1988, denying Petitioner's direct appeal. A warrant for Petitioner's execution was issued setting March 31, 1989, as the execution date. Four days prior to the scheduled execution, Petitioner *pro se* filed a petition for writ of habeas corpus and motion for stay of execution in this court. A hearing was immediately held and the execution stayed to allow Petitioner an opportunity to pursue a state post-conviction proceeding. The federal proceeding was subsequently stayed and then dismissed a few months later. In total, the federal action was open only three and a half months. The acknowledged purpose of that action was to stop an execution that was going to occur before Petitioner could even pursue a state post-conviction proceeding; the goal of the prior federal action was not to have the validity of his state court conviction and death sentence reviewed on the merits. Under these circumstances, Petitioner's conduct does not evidence a failure to act diligently in stating all grounds for relief in the first federal action.

> Abuse-of-the-writ doctrine examines *petitioner's* conduct. The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process.

Farmer, 98 F.3d at 1560, quoting *McCleskey v. Zant*, 499 U.S. 467, 498 (1991)(emphasis original). To hold Petitioner bound to only those grounds stated in the prior action, an action that was begun solely so that he could commence state court post-conviction proceedings before being put to death, is absurd. The motion to dismiss shall be denied.

Petitioner has filed a motion (#50) to hold in abeyance, alternatively to extend the time, for filing a motion for an evidentiary hearing. The scheduling order (#21) directed Petitioner to request an evidentiary hearing at the same time that he opposed a motion to dismiss or filed a traverse to the answer. The motion shall be granted to the extent that Petitioner shall file his motion for an evidentiary hearing at the same time but separately from the traverse.

IT IS THEREFORE ORDERED that Respondents' motion to strike (#52) Petitioner's late opposition is DENIED. Respondents' motion to dismiss (#44) is DENIED. Respondents shall file an answer to the amended petition within sixty (60) days. Petitioner shall have forty-five (45) days to then file a traverse. Respondents shall have thirty (30) days to then file a reply.

IT IS FURTHER ORDERED that Petitioner's motion (#50) is GRANTED to the extent that he shall file his motion for an evidentiary hearing at the same time but separately from the traverse. Respondents shall file a response/opposition to the motion at the same time but separately from their reply to the traverse. Petitioner shall have twenty (20) days in which to then file a reply in support of the motion for an evidentiary hearing.

Dated this 14th day of April 1998.

PHILIP M. PRO
United States District Judge

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
1 9 1998
CLERK, U.S. DISTRICT COURT
DEPUTY
BY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO SLACK,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

Case No. CV-N-95-194-DWH

DENIAL OF CERTIFICATE OF PROBABLE CAUSE

Petitioner Antonio Slack has filed a notice of appeal from the decision of this Court denying his petition for writ of habeas corpus. Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, the notice of appeal will also be considered as a request for the issuance of a certificate of probable cause. The Court of Appeals may not issue its ruling until this court first determines whether Slack has adequate grounds to pursue his appeal. Fed.R.App.P. 22(b); *McCarthy v. Harper*, 449 U.S. 1309 (1981); *Christian v. Rhode*, 41 F.3d 461, 470 (9th Cir.1994).

To obtain a certificate of probable cause to appeal the Court's denial of his petition, Slack need not show that he ought to prevail on the merits of his claims. He must, however, make a substantial showing of the denial of a federal right, and he must demonstrate that there exist legal issues "debatable among jurists of reason." In other words, Slack must show that a court could resolve the issues in a different manner, or that the questions he seeks to raise on appeal "are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983). Since

Slack's appeal would not raise any substantial issue, his request for a certificate of probable cause will be denied.

IT IS THEREFORE **ORDERED** that a certificate of probable cause is hereby **DENIED**.

Dated this 11 day of May, 1998.

UNITED STATES DISTRICT JUDGE

FILED
'98 APR 29 PM 1:56
LARRY R. WILSON
CLERK
BY

FRANNY A. FORSMAN
Federal Public Defender
JOHN C. LAMBROSE
Assistant Federal Public Defender
330 South Third Street, Ste 700
Las Vegas, NV 89101
(702) 388-6577

Attorney for ANTONIO SLACK

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner, v. E.K. McDANIEL et al., Respondents.	CV-N-95-194-DWH NOTICE OF APPEAL

NOTICE is hereby given that Antonio Slack, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment in a civil case dated March 31, 1998.

DATED this 28th day of April, 1998.

JOHN C. LAMBROSE
Asst. Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender and is a person of such age and discretion as to be competent to serve papers.

That on April 28, 1998, she served a copy of the attached NOTICE OF APPEAL by placing a copy in a self addressed envelope postage prepaid to the addressee below:

Julie A. Slabaugh
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

Antonio Slack
#31395
Ely State Prison
PO Box 1989
Ely, NV 89301

PAMELA M. RAMAGE

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
MAR
CLERK, U.S. DISTRICT COURT
BY DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FILED
98 MAR 31 AM 8:24
LANCE S. WILSON
CLERK
BY DEPUTY

ANTONIO A. SLACK,

Plaintiff,

V.

E.K. MCDANIEL, et al, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV-N-95-194-DWH

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

XX **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that respondents' motion to dismiss (#67) is **granted, and this action is dismissed without prejudice.**

March 31, 1998
Date

LANCE S. WILSON
Clerk

Marti Campbell
(By) Deputy Clerk

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
MAR
CLERK, U.S. DISTRICT COURT
BY DEPUTY

FILED
98 MAR 30 PM 4:16
LANCE S. WILSON
CLERK
BY DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO A. SLACK, Petitioner,	)	Case No. CV-N-95-194-DWH
vs.	)	
E.K. McDANIEL, *et al.*, Respondents.	)	MEMORANDUM DECISION AND ORDER

Petitioner Antonio A. Slack has filed an amended petition for habeas relief pursuant to 28 U.S.C. § 2254 (#65). Respondents move to dismiss claiming several grounds are unexhausted and abusive (#66). The Court ordered Slack to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four(C), five, six and seven (#72). Slack has filed a motion for reconsideration of the court order (#73). For the reasons set forth below, the Court finds grounds two, four(C), five, six and seven are abusive and ground three is unexhausted. Therefore the petition must be dismissed.

BACKGROUND

In February 1990, a jury found Slack guilty of second degree murder with use of a deadly weapon. *See* #16, ex.12. Slack was sentenced to two consecutive life terms with the possibility of parole. *See* #16, ex.13. Slack filed a direct appeal with the Nevada Supreme Court which was dismissed. *See* #16, ex.22.

Slack then filed his first federal habeas petition with this court. *See* #16, ex.25. In his first habeas petition, Slack alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation instruction. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all state remedies. *See Slack v. Director of Nevada State Prisons*, CV-N-91-561-HDM.

In 1992, Slack filed a state habeas petition in the Eighth Judicial District Court of Nevada. *See* #16, ex.31. The district court denied the petition, *see* #16, ex.37, and the Nevada Supreme Court dismissed Slack's appeal. *See* #16, ex.39.

In 1995, Slack filed his second federal habeas petition with this Court (#4). After the Court appointed counsel for Slack (#43), he filed an amended habeas petition (#64). In Slack's amended habeas petition he clams he is entitled to relief because: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct

the jury[1]; (5) he was denied effective assistance of counsel[2]; (6) he was denied effective assistance of appellate counsel[3]; and (7) cumulative error.

In their motion to dismiss, respondents argue grounds two, four(C), five, six and seven are abusive. Respondents also argue grounds two, three, four (C), five (B-E), six and seven are unexhausted. Slack was ordered to show cause and prejudice to overcome the abusive bar; however he filed a motion for reconsideration which the court will deny.

ABUSE OF THE WRIT

A second petition may be dismissed for abuse of the writ if new grounds are alleged and the failure to allege them in the previous petition was an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 1548, 1555 (9th Cir.1996). The previous petition need not have been dismissed on the merits. *See id.* at 1557. The instant petition therefore may be subject to dismissal for abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. The State met that burden here by noting Slack's previous writ history, identifying the grounds for relief that appear for the first time in the instant petition and alleging that Slack abused the writ. *See id.* The burden now is on Slack to disprove abuse of the writ by showing cause for failing to raise the new grounds for relief earlier and prejudice therefrom. *See id.* Slack does not meet his burden.

---

[1] In ground four, Slack claims: (a) the reasonable doubt instruction was unconstitutional; (b) the premeditation and deliberation instruction was unconstitutional; and the malice aforethought instruction was unconstitutional.

[2] In ground five, Slack contends his trial counsel was ineffective when he: (a) failed to prevent the introduction of highly prejudicial evidence; (b) failed to object to reasonable doubt jury instruction; (c) failed to object to premeditation and deliberation jury instruction; (d) failed to object to malice aforethought jury instruction; and (e) failed to investigate the facts of case and develop available defenses.

[3] In ground six, Slack argues he was denied effective assistance of appellate counsel when: (a) appellate counsel failed to raise on direct appeal that Slack was denied his right the due process under the Fifth and Fourteenth Amendment when charged with open murder in an information which did not properly plead elements of first degree murder and that the malice aforethought instruction was unconstitutional; and (b) appellate counsel conceded two of the four issues raised on direct appeal.

In reply to the court order instructing Slack to file points and authorities showing cause and prejudice to overcome the abuse of the writ bar, he filed a motion for reconsideration (#73). First the Court notes that Slack has incorrectly filed his motion for reconsideration pursuant to Fed.R.Civ.P.59. Under this rule a party may move for a new trial or an amendment of a judgment. Since there has not been a trial and a judgment has not been entered in this case, Slack cannot bring a motion pursuant to this rule. Additionally even if Slack could bring a motion under Fed.R.Civ.P.59, the motion must be brought within ten days after the entry of judgment. *See* Fed.R.Civ.P. 59(e). Slack's motion was untimely since it was filed two days after the ten day period expired. Nevertheless, the Court will address Slack's arguments in his motion for reconsideration.

In his motion for reconsideration, Slack claims the State has not established the habeas petition is abusive, the amended petition is not successive, and that the case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). As previously noted, the State has met its burden under *McClesky* by specifying which grounds for relief in the amended habeas petition are abusive. Next, the instant petition is Slack's second petition and thus successive. The Ninth Circuit has held that a judge may find a second petition is abusive when new grounds are alleged and a petitioner failed to allege them in the previous petition, even if the previous petition was dismissed for failing to exhaust state remedies. *See Farmer*, 98 F.3d at 1557. Lastly, Slack wrongly asserts the case is governed by the AEDPA because it was commenced after April 26, 1996. First, the instant case was commenced March 27, 1995. Second, the amendments to 28 U.S.C. §§ 2244(a) and 2255 resulting from the AEDPA are not retroactive. *See Lindh v. Murphy*, --- U.S. ----, ----, 117 S.Ct. 2059, 2063 (1997). Accordingly, the AEDPA is not applicable to this case.

Thus, since Slack has failed to demonstrate cause and prejudice to overcome the abuse of the writ bar, the Court will dismiss grounds two, four(c), five, six and seven as abusive.

EXHAUSTION

Although respondents argue several grounds are unexhausted, the court will only address ground three since all other grounds will be dismissed as abusive. Title 28 U.S.C. § 2254 (b) and (c) provide that a state prisoner must exhaust all available state court remedies before filing a petition for habeas corpus in federal court. The exhaustion of available state judicial remedies is ordinarily a prerequisite to obtaining federal habeas corpus relief. 28 U.S.C. § 2254(b) (1988); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). To demonstrate compliance with the exhaustion requirement, a habeas applicant must show that the claim included in the federal petition was "fairly presented" to the state's highest court, *Picard v. Connor*, 404 U.S. 270, 275 (1971), or demonstrate that no state remedy remains available. *Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1992). A claim has been "fairly presented" to the state court if the petitioner has described the operative facts and the legal theory upon which he bases his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Furthermore, a petitioner cannot merely allege exhaustion; the record must show that the petitioner sought review in the highest state court. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 1023 (1982). In addition, the habeas petitioner must exhaust his state remedies as to each of his federal claims. If a habeas corpus petition contains both exhausted and non-exhausted claims, the petition must be dismissed. *Rose*, 455 U.S. at 520.

In ground three, Slack claims his Fourteenth and Fifth Amendment right to due process was violated when the jury was prejudiced by evidence of sexual misconduct. Respondents contend the claim is unexhausted because although Slack presented the facts of this claim to the Nevada Supreme Court, he did not claim his Fourteenth and Fifth Amendment rights were violated. If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Johnson v. Zenon*, 88 F.3d 828, 830 (1996); *see also Ybarra v. Sumner*, 678

F.Supp. 1480, 1481 (D.Nev. 1988) (citing *Picard*, 404 U.S. at 276). In his opening brief to the Nevada Supreme Court on direct appeal, Slack never argued his Fifth or Fourteenth Amendment right to due process was violated when prejudicial evidence was presented to the jury. In his opening brief, Slack relied only upon state law to support his claim. *See* #16, ex.20, pp. 15-18. Thus, the Court finds ground three is unexhausted.

CONCLUSION

Since ground three of Slack's third amended habeas petition is unexhausted, this action will be dismissed to allow Slack the opportunity to present the unexhausted claim to the state court. If Slack wishes to continue with this proceeding instead of returning to state court, he will need to re-open this proceeding and abandon the unexhausted claim as described below. *See Reutter v. Crande*, 109 F.3d 575 (9th Cir. 1997). Alternatively, Slack may immediately commence a new federal action in which this court could review the merits of the unexhausted claim because the new action would be subject to the statutory changes effected by the Antiterrorism and Effective Death Penalty Act (AEDPA)[4]; however, relief could not be granted based on any unexhausted claim.

Pursuant to the AEDPA, the dismissal of this action will trigger the commencement of the one year statute of limitations period for Slack to return to federal court with a new action. 28 U.S.C. § 2244(d)(1). The time during which Slack's post conviction proceeding is pending in state court will not count toward the one year period. 28 U.S.C. § 2244(d)(2). Therefore, if Slack waits three months after this dismissal to file a state post conviction petition, he will have only nine months from the disposition of that state proceeding in which to commence a new federal proceeding. The failure to timely commence a new federal proceeding will bar Slack from having the validity of his conviction and/or sentence reviewed in federal court.

---

[4] Until recently, a federal court could not proceed with a mixed petition that contained both exhausted and unexhausted claims for habeas corpus relief. *Rose*, 455 U.S. at 521-22; *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983). However, in April 1996, Congress amended 28 U.S.C. § 2254 to give federal courts the authority to deny habeas relief based on unexhausted grounds. Thus, now a federal court can address a mixed petition, but can only deny relief regarding any unexhausted grounds.

IT IS THEREFORE **ORDERED** that Slack's motion for reconsideration (#73) is **DENIED**.

IT IS FURTHER **ORDERED** that grounds two, four(C), five, six and seven are **DISMISSED** with prejudice as abusive.

IT IS FURTHER **ORDERED** that respondents' motion to dismiss (#67) is **GRANTED**, and this action is **DISMISSED** without prejudice. If Slack wishes to abandon the unexhausted claim and proceed with this action, he should file a motion to vacate the judgment and a declaration of abandonment, signed by petitioner, of the above identified ground within thirty (30) days. The Clerk shall enter judgment accordingly.

Dated this 30th day of March, 1998

UNITED STATES DISTRICT JUDGE

District	Off.	Docket No. Yr.	Number	Filing Date Mo.	Day	Yr.	J	Nature Suit	B 23	Judge
0978	3	95	00194	03	27	95	3	530		7811

CLOSED

95 00194DWH

CAUSE: 28 U.S.C. 2254 - HABEAS CORPUS

000190

~~PLAINTIFF~~

SLACK, ANTONIO TONTON

~~DEFENDANT~~

MCDANIEL, E.K.;
ATTORNEY GENERAL OF THE STATE OF NEVADA, Frankie Sue Del Papa

FIRST AMENDED PETITION, fld 10/8/96 #31
SECOND AMENDED PETN/HC - 6/10/97 - #51
THIRD AMENDED PETN/HC - 12/24/97 - #64

APPEAL FLD 4/29/98 (#76)
C/A# _____

EXEMPT FRCP 16(b)

ATTORNEYS

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UNITED STATES DISTRICT COURT DOCKET

DC 111S (Rev. 7/85)

000191

DATE	NR	PROCEEDINGS — Antonio T. Slack vs. Director, NDOP, et.al. — CV-N-95-194-DWH
/27/95	1	MOTION/IFP. olr
--	--	JS-5 (AT). olr
/12/95	2	ORDER(DWH): ORD Petnrs mtn/IFP is GRANTED on temp basis. Clk/crt shl send petnr IFP form/instructs. Petnr shl hv 45 dys to file corr mtn. Failr wil rslt in dismsl ths actn. FUR ORD petn shl be RETAINED but not filed/srvd untl petnrs fin stat is det fur. EOD 4/13/95 (AT). Cps dist. olr
/8/95	3	MOTION to procd IFP obo P. (AT) blg. (2)
/10/95	--	SUB to DWH/rlo: Item #3. (AT) blg.
/30/95	4	PETITION for a writ of H/C obo P.
--	5	ORDER: (DWH) ORD tht the mtn for lv to procd IFP is granted. (furth specs in Ord.) FUR ORD tht Clerk of Crt shl file the petn for a writ of H/C & srv R(s) by cert/mail but the R(s), who shl answ sd petn as directed in the ord being issd herewith. EOD/Cps. dist. 6/8/95 (AT) bm.
--	6	ORDER: (DWH) ORD P shl hv 20 dys frm the dte this ord is ent in wh to inform the crt of any & all adtnl clms for H/C rlf of wh P is aware. (furth specs in Ord.) FUR ORD tht if P files a stmnt of addtnl clms, R(s) shl hv 20 dys frm the dte the stmnt is fld w/in wh to answ, or otherw plead to, the petn & the stmnt of addtl clms. (furth specs in Ord.) EOD/Cps. dist. 6/8/95. (AT) bm.
5/16/95	7	MINUTE ORDER (DWH): ORD P's ltr rec'vd 6/1/95 shl be filed; in as much as it is a reqst to consolidat this actn w/prior actn (CV-N-91-561-HDM), it is denied (cps dist)(AT).csd (EOD 6/23/95)
6/26/95	8	MOTION for appt of cnsl obo P. (AT) (m) mlc 10/12 (13)
7/5/95	9	MOTION/ORDER (DWH): ORD P shl hv enlrgmnt of time to 7/31/95 to file his statmnt of addt'l clms (cps dist)(AT).csd
7/10/95	10	OPPOSITION to mtn for appt of cnsl (8) obo Respndts. (m) (AT) mlc
7/12/95	11	STATEMENT of add'l claims obo petnr (6,9). (m) (AT) mlc
7/19/95	12	REPLY in supprt of P's mtn for appointmnt of cnsl (#8) obo P (m)(AT).csd
7/21/95	--	SUBD TO DWH: #8,#10,#12. csd
8/7/95	--	sub to DWH: item # 6, 11. (AT)
1/8/95	13	MOTION/ORDER (DWH): ORD Rs grntd enlrgmnt of time to 9/15/95 to file/srv respons to P's petn for writ of H/C (#4) (cps dist)(AT).csd
8/23/95	14	MINUTE/ORDER: (DWH) ORD Ps mtn (#8) for apt of cnsl stayed & sh be resub by Clk along w/resp to petitn wh the latter is ripe for decisn. Cps.Dist. (AT) blg. *mld-8/29/95.

CONT'D TO PG. 2

PLAINTIFF	DEFENDANT	CV-N-95-194-DWH DOCKET NO
ANTONIO T. SLACK	DIRECTOR, NDOP, ET. AL.	PAGE 2 OF ___ PAGES

DATE	NR.	PROCEEDINGS
9/15/95	15	MOTION to dism petn for writ of H/C obo Rs (m)(AT).csd 16,21 (27)
---	16	INDEX OF EXHIBITS in supprt of Rs' mtn to dism petn for writ of H/C (#15) obo Rs (m)(AT).csd **(located in separate folder due to size)**
---	17	LETTER addr to clk/ct frm P re stat of case (AT).csd
~~9/18/95~~	--	~~SUBD TO DWH: #17. csd~~
9/25/95	--	SUB TO DWH: Item #15, 16. (AT) bm + #18, 20, 22.
2/29/96	18	ORDER (DWH): ORD tht P shl hv 20 dys frm date of this order w/in which to file pts & auth in oppo to mtn to dism (#15). Rs shl hv 10 dys to file reply. If P fails to resp to this order, mtn will be granted. FUR ORD tht Ps mtn for apptmt of cnsl (#8) is denied. (See order for fur specs) (EOD/cps dist 3/4/96) (AT) rd
3/27/96	--	SUB TO DWH: Item #6, 11, 15, 16. (AT) bm
4/8/96	19	MOTION for enlrgmnt of tm obo P (m)(AT).rm
---	20	MINUTE ORDER (DWH): ORD P shl hv to 4/19/96 to file oppo to mtn to dism (#15); flr to file oppo by tht dt shl be deemed consent to granting of mtn (cps dist)(AT).rm
---	21	OPPOSITION to mtn to dismiss (#15) obo P. (m)(AT).rm
4/17/96	22	REPLY in supprt of mtn to dism petn for writ of H/C (#15) obo Rs. (m) (AT) bm
4/23/96	--	SUB TO DWH: Item #15, 16, 21, 22. (AT) bm
04/24/96	23	MOTION for deflt obo P. (m) (AT) lg (26)
04/25/96	24	RESPONSE to mtn for ruling of deflt **(#23)** obo Rs (m) (AT) lg
5/8/96	25	REPLY to rsponse to mtn for deflt (#23) obo P. bm.
5/9/96	--	SUB TO DWH: Item #23, 24, 25. (AT) bm
05/15/96	26	MINUTE/ORDER: (DWH) ORD Ps mtn for deflt **(#23)** denied. Rs not requrd to file ans until mtn to dism **(#15)** decided. CpsDist. (AT) lg *mld-05/16/96
8/13/96	27	**MEMORANDUM/DECISION/ORDER**: (DWH) ORD Rs' mtn to dism (#15) is granted to the extent tht P shl hv 30 dys in wh to file an am petn clarifying the grnds discussed herein. The Clrk shl prov P w/a cpy of the Crt's petn for writ of H/C form & insts thereto. EOD/Cps. dist. 8/16/96 (AT) bm
8/26/96	28	MOTION for enlrgmnt of tm til 9/13/96 in wh to file & srv his am petn for writ of H/C obo P. (m) (AT) bm (29)
8/27/96	--	SUB TO DWH: Item #28. (AT) bm

see Page 3

PLAINTIFF	DEFENDANT	CV-N-95-194-DWH DOCKET NO
ANTONIO T. SLACK	DIRECTOR, NDOP, et al.,	PAGE 3 OF ___ PAGES

DATE	NR.	PROCEEDINGS
8/29/96	29	MINUTE ORDER: (DWH) ORD P has moved (#28) for an enlgmnt of tm in wh to comply with the Crt's pr ord (#27). P's mtn (#28) is granted to the extent tht he will hv to & incldng **10/21/96** in wh to file an am petn. Cps. dist. 8/30/96 (AT) bm
10/8/96	30	APPLICATION to procd IFP obo P. bm (32 moot)
--	31	**FIRST AMENDED PETITION for a Writ of H/C obo P.**
11/22/96	--	SUB TO DWH: Item #30, 31. (AT) bm
11/25/96	32	MINUTE/ORDER: (DWH) ORD app to proced IFP **(#30) denied,moot**, IFP grantd @ #5. CpsDst (AT) lg. *mld-12/02/96
12/02/96	--	SUB TO DWH/RLO: Item #31. (AT) lg
12/5/96	33	MINUTE ORDER: (DWH) ORD tht the Clrk shl send to R(s) a cpy of P's am petn for writ of H/C #31. Rs shl hv 30 dys in wh to answ or rspond. EOD/Cps. dist. 12/6/96 (AT) bm
12/27/96	34	NOTICE tht Deputy AG Julie A. Slabaugh has assuemd responsib for rep the int of the named R(s) obo Rs. (m) (AT) bm
12/31/96	35	MOTION for appnt of cnsl obo P. (m) (AT) 37,43
1/6/97	36	MOTION for enlrgmnt of tm til 2/21/97, in wh to file & srv rsponse to P's am petn for writ of H/C obo Rs. (m) (AT) (39)
1/8/97	--	SUB TO DWH: Item #36. (AT) bm
1/10/97	37	OPPOSITION to mtn for appnt of cnsl (#35) obo Rs. (m) (AT) bm
--	38	MOTION for jdgmnt on the pleadings obo P. (m) (AT) bm 41,43
1/13/97	39	MINUTE ORDER: (DWH) ORD Rs' mtn for enlrgmnt of tm (#36) is granted. Rs shl hv to & incldng 2/21/97, in wh to file & srv their rsponse to P's am petn. Cps. dist. 1/14/97 (AT) bm
1/21/97	40	OPPOSITION to mtn for enlrgmnt of tm (#36) obo P. [Moot per #39]
--	41	OPPOSITION to mtn for jdgmnt on the pleadings (#38) obo Rs. (m) (AT)
02/05/97	--	SUB TO DWH: Item #35 (AT) mlc

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PLAINTIFF	DEFENDANT	CV-N-95-194-DWH DOCKET NO
SLACK	NDOP et al	PAGE 4 OF ___ PAGES

DATE	NR.	PROCEEDINGS
02/10/97	42	MOTION for exttime (until 3/7/97) to resp to amd petn H/C obo respondts (31). (m) (AT) mlc (43)
02/11/97	--	SUB TO DWH: Item #42 (AT) mlc
02/13/97	43	ORDER appointing counsel (DWH) ORD petn's mtn for appt of cnsl (35) to the extent the FPD for the District of NV is appt to represent petnr; Clk shall send a copy of the petn H/C (31) to the FPD; cnsl for petnr shall file an amd petn H/C within 45 days or a ntc to the crt indicating his/her intent to proceed with the current amd petn (31); respondnts' mtn for exttime (42) is denied as moot; petnr's mtn for jgm on the pldgs (38) is denied. (copies dist) (AT) mlc EOD 2/14/97
02/13/97	44	MOTION to strike first amd petn (31) .. and .. MOTION to file an second amd petn H/C obo petnr. (m) (AT) mlc (45) (48)
02/14/97	45	OPPOSITION to mtn to strike first amd petn and mtn to file a second amd petn (44) obo respondts. (m) (AT) mlc
02/24/97	46	NOTICE of representation of petnr (Deborah Trevino, Esq.) (m) (AT) mlc
03/11/97	--	SUB TO DWH: Items 43,44 (AT) mlc
03/12/97	--	LETTER from petnr re: order #43 appt of cnsl. mlc
03/28/97	47	UNOPPOSED MOTION for exttime for petnr to file an amd petn obo petnr. (m) (AT) mlc (48)
03/28/97	--	SUB TO DWH: Item #47 (AT) mlc
04/01/97	48	MINUTE ORDER (DWH) ORD petnr's unopposed mtn for exttime (47) is granted; petnr shall have until 5/30/97 to file the amd petn; petnr's mtn to strike (44) is denied as moot (see #43); Clk shall make a copy of the letter rec'd 3/12/97 from petnr and send a copy to cnsl for petnr. (copies dist) (AT) mlc EOD 4/2/97
05/27/97	49	UNOPPOSED MOTION for exttime to file amd petn H/C (until 6/10) obo petnr. (m) (AT) mlc (50)
05/28/97	--	SUB TO DWH: Item #49 (AT) mlc
05/29/97	50	MINUTE ORDER (DWH) Petnr's unopposed mtn for exttime (49) is granted; petnr shall have until 6/10/97 to file an amd petn. (copies dist) (AT) mlc EOD 5/29/97

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PLAINTIFF	DEFENDANT	DOCKET NO
SLACK	DIRECTOR, NDOP et al	PAGE 5 OF ___ PAGES

DATE	NR.	PROCEEDINGS
06/10/97	51	SECOND AMENDED PETN/HC obo petnr. (50) (m) (AT) mlc
06/11/97	--	SUB TO DWH: Item #51 (AT) mlc
06/13/97	52	INDEX of exhibits in support of first amd petn writ H/C (31) obo petnr. (m) (AT) mlc
06/16/97	53	MINUTE ORDER (DWH) ORD respondnts shall have 30 days to ans/resp to the second amd petn (51). (copies dist) (AT) mlc EOD 6/17/97
07/03/97	54	MOTION for more definite stmt obo respondnts. (m) (AT) mlc (56)(57)(58)(60) (61) (63)
07/21/97	55	CLIENT verification of amd petn H/C (51) obo petnr. (m) mlc
07/21/97	56	UNOPPOSED MOTION for exttime to file an answer to mtn for more definite stmt (54) obo petnr. (m) (AT) mlc (until 8/4) (57)
07/23/97	--	SUB TO DWH:Item #56 (AT) mlc
07/24/97	57	MINUTE ORDER (DWH) ORD petnr's unopposed mtn for exttime (56) is granted; petnr shall have until 8/4/97 to respond to the mtn for more definite stmt (54) (copies dist) (AT) mlc EOD 7/24/97
08/04/97	58	UNOPPOSED MOTION for exttime to file answer to mtn for more definite stmt (54) obo petnr. (m) (AT) mlc (59)
08/04/97	--	SUB TO DWH: Item #58 (AT) mlc
08/07/97	59	MINUTE ORDER (DWH) ORD petnr's unopposed mtn for exttime (58) to file a resp to the mtn for more definite stmt (54) is granted; petnr shall have until 8/18/97 to file his resp. (copies dist) (AT) mlc EOD 8/7/97
08/18/97	60	RESPONSE to mtn for more definite stmt . . . and . . . REQUEST to file fourth amd petn obo petnr. (m)(AT) mlc (54) (61)(63) (Attachment struck/returend #63)
08/28/97	61	REPLY to response to mtn for more definite stmt and request to file fourth amd petn (54,60) obo respondnts. (m) (AT) mlc
08/29/97	--	SUB TO DWH: Item #54,60 (AT) mlc

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PLAINTIFF	DEFENDANT	DOCKET NO.
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DATE	NR.	PROCEEDINGS
09/26/97	62	NOTICE of addr change obo respondents. (m) mlc
12/03/97	63	MINUTE ORDER (DWH) ORD respondts' mtn for more definite stmt (54) is granted; petnr shall have 20 days to file an amd petn; ORD petnr's mtn for leave to file a fourth amd petn (60) is denied; Clk shall strike the attached petn and return it to petnr's cnsl. (copies dist) (AT) mlc EOD 12/4/97
12/24/97	64	THIRD ~~SECOND~~ AMENDED PETITION obo P. (m) (AT) blg.
--	65	ADDITIONAL/RESPONSE to renewed mtn for more definite stmnt (#54) REQUEST for lv to file 2nd am petn (#64) obo P. (m) (AT) blg. (66)
12/31/97	--	SUB to DWH: Item #64, & 65. (AT) blg.
01/15/98	66	MINUTE ORDER (DWH) petnr has filed a mtn for leave to file a Third Amd Petn (65,64) which is erroneously titled second amd petn; the mtn for leave (65) is granted; ORD petnr's mtn for leave (65) is granted; respondents shall have 30 days to file an ans/response to the third amd petn. (64). (copies dist) (AT) mlc EOD 1/15/98
01/29/98	67	MOTION to dismiss third amd petn/HC (64) obo respondnts. (m) (AT) mlc (68,69) (70)(71) (74,75)
02/17/98	68	MOTION for exttime (2/24/98) to file resp/oppo to mtn to dismiss (67) obo petnr. (m) (AT) mlc
02/18/98	--	SUB TO DWH: Item #68 (AT) mlc
02/19/98	69	MINUTE ORDER (DWH) ORD petnr's mtn for exttime (68) is granted; petnr shall have until 2/24/98 to file a resp/oppo to mtn to dismiss. (67) (copies dist) (AT) mlc EOD 2/19/98
02/24/98	70	OPPOSITION to mtn to dismiss petn writ H/C (67) obo petnr. (m) (AT)mlc
03/06/98	71	REPLY to oppo to mtn to dismiss petn writ H/C (67,70) obo respondents. (m) (AT) mlc
03/10/98	72	MEMORANDUM/DECISION/ORDER (DWH) ORD petnr shall have 15 days to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four(C),five,six, and seven of the petn H/C (64); no exttimes will be granted. (copies dist) (AT) mlc EOD 3/11/98
3/26/98	73	MOTION for reconsdrtn of memo decisn & ord (#72) obo P. (m) (AT) blg. (74,75)

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PLAINTIFF	DEFENDANT	DOCKET NO.
SLACK	DIRECTOR, NDOP et al	PAGE 7 OF ___ PAGES

DATE	NR.	PROCEEDINGS
03/30/98	--	SUB TO DWH: Item #67,73 (AT) mlc
03/30/98	74	MEMORANDUM/DECISION/ORDER (DWH) ORD petnr's mtn for reconsid (73) is denied; Grounds two, four (C), five, six, and seven are dismissed with prej as abusive; respondents' mtn to dismiss (67) is granted and this actn is dism without prej; should petnr wish to abandon the unexhausted claim and proceed with this actn; he should file a mtn to vacate the jgm and a declaration of abondonment, of the above identified ground within 30 days; Clk shall enter jgm. (copies dist) (AT) mlc EOD 3/31/98
03/31/98	75	JUDGMENT (LSW/mlc) ORD respondents' mtn to dismiss (67) is granted and this actn is dismissed without prej. (copies dist) (AT) mlc EOD 3/31/98
	--	JS-6 (AT) mlc
04/29/98	76	NOTICE OF APPEAL of order/jgm of 3/30/98 and 3/31/98 (74,75) obo petnr. (m) (AT) mlc
04/29/98	--	SUB TO DWH: Item #76 (for COA order).(AT) mlc
5/11/98	77	APPLICATION for Certificate of Probable Cause obo P. (m) (AT) blg. (78)
5/12/98	--	SUB to DWH: Item #77. (AT) blg.
05/12/98	78	ORDER (DWH) ORD the cert of probable cause is denied. (copies dist) (AT) mlc EOD 5/19/98
05/18/98	79	TRANSMITTAL LETTER/CERTIFICATE OF RECORD sent to USCA forwarding certified copies of ntc of appeal, order/jgm, and order denying CPC with docket entries. (copies dist) (AT) mlc EOD 5/19/98
	--	COMPLETE file sent to USCA. mlc

Robert Jeffrey FARMER,
Petitioner–Appellee,

v.

E.K. McDANIEL;* Attorney General of the State of Nevada, Respondents–Appellants.

No. 95–99016.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 18, 1996.

Decided Oct. 29, 1996.

After defendant's first-degree murder conviction was upheld on direct appeal, 101 Nev. 419, 705 P.2d 149, defendant petitioned for habeas relief. The United States District Court for the District of Nevada, Lloyd D. George, Chief Judge, dismissed petition without prejudice, and state appealed. The Court of Appeals, Rymer, Circuit Judge, held that: (1) state had standing to appeal, and (2) amended third habeas corpus petition filed by state prisoner could be dismissed for abuse of the writ even though prior petitions were dismissed for failure to exhaust and were thus not reviewed on the merits.

Reversed; vacated and remanded.

Schroeder, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. **Habeas Corpus ⇐815**

State had standing to appeal from order dismissing amended third habeas petition without prejudice; as practical matter, dismissal of petition put end to action in district court and state did not gain dismissal with prejudice of claims asserted for abuse of writ, although state prevailed to extent that petitioner was required to exhaust claims that state contended were unexhausted.

2. **Habeas Corpus ⇐898(1)**

When state alleges that grounds for habeas relief alleged in second or subsequent petition are "new and different" under rule governing dismissal of successive petitions, abuse of writ analysis is not foreclosed as matter of law solely because prior petitions have not been reviewed on merits; rather, this should simply be important factor that informs district court's discretion in applying abuse of the writ doctrine. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

3. **Habeas Corpus ⇐814**

Order dismissing third amended habeas corpus petition without prejudice for petitioner's failure to exhaust state avenues of relief was final order that could be appealed by state.

4. **Habeas Corpus ⇐899**

Order dismissing third amended habeas petition without prejudice, to permit petitioner to exhaust state remedies, did not dismiss only the petition, where by its terms, order and judgment dismissed action, and each of petitioner's three federal habeas petitions launched new action, with new number.

5. **Habeas Corpus ⇐898(1)**

Presentation of unexhausted claims in amended third habeas petition did not require dismissal of entire petition as abuse of writ. Rules Governing § 2254 Cases, Rule 9, 28 U.S.C.A. foll. § 2254.

6. **Habeas Corpus ⇐898(1)**

Habeas corpus rule governing dismissal of successive petitions permits district courts to dismiss second or successive petition if new and different grounds are alleged and judge finds failure of petitioner to assert those grounds in prior petition, whether or not result on the merits, was abusive. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

7. **Habeas Corpus ⇐898(1)**

Amended third habeas corpus petition filed by state prisoner could be dismissed for abuse of the writ even though prior petitions were dismissed for failure to exhaust and were thus not reviewed on the merits; district court was not precluded as matter of law from considering whether petitioner's conduct in failing to allege grounds in prior petitions that he alleged third time around was abusive solely because his prior petitions were not reviewed on the merits. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

8. **Habeas Corpus ⇐898(1)**

District court is not precluded as matter of law from considering whether habeas petitioner has abused the writ by alleging in subsequent federal habeas petition new and different grounds from those alleged in prior habeas petition, whether or not that prior petition was determined on the merits. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

9. **Habeas Corpus ⇐898(1)**

Claims that were presented in state prisoner's initial and second federal habeas petitions but were not determined on the merits because they were unexhausted were outside scope of rule governing dismissal of successive petitions for abuse of the writ. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

Robert E. Wieland, Deputy Attorney General, Carson City, NV, for respondents-appellants.

Michael Pescetta, Assistant Federal Public Defender, Las Vegas, NV, for petitioner-appellee.

Appeal from the United States District Court for the District of Nevada, Lloyd D. George, District Judge, Presiding. D.C. No. CV–S–93–0434–LDG.

Before: SCHROEDER, RYMER and KLEINFELD, Circuit Judges.

RYMER, Circuit Judge:

This appeal requires us to consider a novel, but narrow question: whether an amended third habeas corpus petition by a prisoner in state custody may be subject to dismissal for abuse of the writ even though prior petitions were dismissed for failure to exhaust and thus were not reviewed on the merits.[1] The district court thought not, but the State of Nevada wants the opportunity to argue that Robert Jeffrey Farmer has filed a series of petitions with new, unexhausted claims to avoid (and delay for more than seven years) a review of his sentence and conviction in federal court. It has timely appealed a judgment dismissing Farmer's amended third petition pursuant to *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

[1, 2] Although Farmer submits that dismissal of his amended third petition without prejudice is not a final, appealable order, and that the state lacks standing to appeal from an order in its favor, we think otherwise. As a practical matter, dismissal of Farmer's petition put an end to this action in the district court and, despite prevailing to the extent that Farmer is required to exhaust claims that the state contends were unexhausted, Nevada did not get all that it wanted—dismissal with prejudice of claims asserted for abuse of the writ—but instead faces the prospect of further litigation on these claims in a different forum. For this reason the State has standing to appeal from that part of the order that is unfavorable to it. Having jurisdiction, we conclude that when the state alleges that the grounds for relief alleged in a second or subsequent petition are "new and different" under Rule 9(b) of the Federal Habeas Corpus Rules, abuse of the writ analysis is not foreclosed as a matter of law solely because prior petitions have not been reviewed on the merits. Rather, this should simply be an important factor that informs the district court's discretion in applying the abuse of the writ doctrine. We therefore vacate the district court's judgment and re-

* E.K. McDaniel, the current warden of the Nevada State Prison that has custody of Robert Jeffrey Farmer, has been substituted for Ron Angelone, in accordance with Fed.R.Civ.Proc. 25(d)(1), and pursuant to Federal Rule of Appellate Procedure 43(c)(1).

1. We decide this question entirely under the law as it existed prior to enactment of the "Antiterrorism and Effective Death Penalty Act of 1996." Pub.L. No. 104–132, 110 Stat. 1214 (April 24, 1996). Although § 107, to be codified in part at 28 U.S.C. § 2266(c), by its terms makes the Act's Special Habeas Corpus rules applicable to all capital cases pending on the date of enactment (if other conditions are also met), no one has suggested that the conditions are met and that the Act in fact applies to this appeal.

mand for it to consider whether any of the grounds alleged in the amended petition are "new and different" from those grounds alleged in Farmer's second petition and, if so, whether Farmer's failure to assert those grounds in his prior (second) petition was an abuse of the writ.

I

Farmer murdered a man the night of January 18–19, 1982. On March 26, 1984, he pleaded guilty to murder in the first degree and was sentenced to death. The Nevada Supreme Court affirmed his conviction and sentence August 27, 1985, *Farmer v. State of Nevada*, 101 Nev. 419, 705 P.2d 149 (1985), and the United States Supreme Court denied his petition for certiorari, *Farmer v. Nevada*, 476 U.S. 1130, 106 S.Ct. 1999, 90 L.Ed.2d 679 (1986).

On September 16, 1986, Farmer filed a petition for a writ of habeas corpus in the state trial court and a week later, filed his first petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court. The federal petition, filed with the assistance of counsel, sought a stay of execution, which the district court entered. The petition also, however, alleged different grounds for relief from those being pursued in state court, which prompted the district court to warn Farmer that his failure to assert grounds known to him in his federal petition may bar the assertion of such grounds in a future federal petition as an abuse of the writ.[2] As a result, Farmer moved to dismiss the petition without prejudice. The district court so ordered February 6, 1987, to permit Farmer to exhaust state remedies. Although the court also vacated the stay of execution, it appears that no new date was set while state habeas proceedings were pending.

The Nevada Supreme Court ultimately refused to address the merits of Farmer's claims because they "have been either procedurally barred, or [ ] Farmer has failed to sustain his burden of proof or show prejudice." *Farmer v. Director, Nevada Dept. of Prisons*, 104 Nev. 856, 809 P.2d 603 (1988) (unpublished disposition). The United States Supreme Court denied certiorari February 27, 1989. *Farmer v. Sumner*, 489 U.S. 1060, 109 S.Ct. 1331, 103 L.Ed.2d 599 (1989).

Farmer filed his second federal habeas petition April 7, 1989. The district court stayed Farmer's rescheduled execution date of May 2, 1989; appointed new counsel to represent him in the federal proceedings; and again cautioned Farmer that if he "fails to include all possible grounds for relief, he may later be precluded from raising the previously omitted grounds because the omission may be considered an abuse of the writ" under Rule 9(b). On July 13, 1989, Farmer moved to dismiss his second petition without prejudice because "he has claims to raise which have not heretofore been raised in state court, and therefore could not raise in this petition due to the exhaustion of state remedies requirement." Nevada opposed dismissal on the ground that the claims Farmer wanted to exhaust in the state court either were not legitimate constitutional claims or were procedurally barred. Meanwhile, Farmer asked the court to hold the federal proceeding in abeyance rather than dismiss it, in the event the state court refused to issue a stay. However, the court again dismissed Farmer's petition without prejudice under *Rose v. Lundy*,[3] and dissolved the stay of execution.

Farmer then started a new round of state proceedings, which ended when the Nevada Supreme Court dismissed his appeal from the dismissal of his petition for post-conviction relief. On May 11, 1993, Farmer filed his third federal habeas petition. Nevada moved to dismiss the petition with prejudice as an abuse of the writ under Rule 9(b), and also raised exhaustion and procedural default defenses. The district court denied Nevada's motion to dismiss as premature; rejected Nevada's abuse of the writ defense since Farmer's two prior federal habeas petitions "were dismissed by the court because they included unexhausted claims; they were not dismissed on the merits of those claims"; and, responding to *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), allowed Farmer six months to amend his third federal petition setting forth "all possible grounds for relief."

Pursuant to this order, Farmer filed his amended third petition for writ of habeas corpus August 15, 1994. He alleged that 10 of its 27 claims had "arguably" been exhausted, but that none had been deliberately withheld or waived. Contending that Rule 9(b) covers situations in which new claims are raised which were not raised in the first petition, and relying on the decision of the United States Supreme Court in *McCleskey*, Nevada moved to dismiss the petition with prejudice on the ground that the court was obliged to conduct an abuse of the writ inquiry in light of Farmer's writ history (which, in the state's view, would show that the amended third petition was filed only to vex, harass and delay, and that the new claims of error could and should have been exhausted in accordance with the court's prior orders) before it reached whatever *Rose v. Lundy* problems continued to lurk in the third amended petition. The state also argued that the unexhausted claims were procedurally barred, and conclusory. As before, Farmer requested dismissal without prejudice so that he could return to state court to exhaust his new and unexhausted claims. Noting that all of the state's other arguments were addressed when its first motion to dismiss was denied, the district court again dismissed pursuant to *Rose v. Lundy*, advising that "this will be the *only* opportunity to return to state court to exhaust any unexhausted grounds."[4]

Nevada filed a timely notice of appeal from the district court's "Order Dismissing Mixed Petition and the Judgment in a Civil Case entered June 27, 1995 as to all issues of law."[5] Farmer moved to dismiss for lack of jurisdiction. We consider this motion first.

II

Farmer challenges our jurisdiction because the district court's disposition is not a final order, and because Nevada is not an aggrieved party inasmuch as dismissal on exhaustion grounds favors the state. He argues that the order and judgment dismissed only the amended petition, not the underlying action, and that even if the state prevailed on its abuse of the writ theory, the result would be the dismissal with prejudice of only some of the claims in the amended

2. The district court's November 4, 1986 minute order states:

> It appears that petitioner is pursuing post-conviction relief in the State court on grounds not addressed in the 2254 petition filed in this Court. The Court notes that if petitioner goes forward in this manner, he may be waiving his right to seek federal habeas relief in the future with regard to those issues which are being pursued in the State court and which are not included in the petition before this Court. The failure of petitioner to assert grounds known to him in a petition may bar the assertion of such grounds in a future petition for habeas corpus in the federal district court as an abuse of the writ. Here petitioner and his counsel are well advised of additional possible habeas grounds which could be asserted before this Court but which are unexhausted and are being pursued in the State court. If petitioner desires to preserve the right to pursue the issues being raised in the State Court in future federal habeas proceedings, he may want to consider the dismissal of this petition without prejudice so that the additional issues may be exhausted.

3. In *Rose v. Lundy*, the Court adopted a total exhaustion rule which, in effect, gives habeas litigants who initially submit a mixed petition of exhausted and unexhausted claims a chance to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims, thereafter presenting the federal court "with a single habeas petition." 455 U.S. at 520, 102 S.Ct. at 1204. The Court cautioned, as the district court did here in its orders dismissing Farmer's first two petitions, that a prisoner who proceeds with exhausted claims and deliberately sets aside unexhausted claims risks dismissal of subsequent federal petitions on abuse of the writ grounds.

4. The order further provided that "[i]f Petitioner learns of additional unexhausted grounds not currently alleged in this action while the state court proceedings are pending *and* is able to exhaust those grounds prior to returning to this Court, then those additional *exhausted* grounds will be allowed to be raised in this court in a subsequent petition." The district judge set time limits, and ordered that a new action be assigned to him rather than by draw.

5. After briefing but before oral argument on Nevada's appeal, Farmer filed a motion to take judicial notice of the subsequent state court proceedings in this case. We deny the motion inasmuch as what has occurred in Nevada state court since the district court dismissed the action and amended third petition is not material to the narrow issue we face on appeal.

petition. As dismissal of some, but not all, claims in a habeas petition is not a final order, Farmer suggests, the order appealed from is not a final decision. Nevada counters that it does seek review of a final order since the district court entered a judgment dismissing the action, the state will lose its right to have this petition decided unless we consider its appeal, and the practical effect of the court's order is to grant Farmer a stay of indeterminate length. Farmer contends that regardless, Nevada lacks standing since the order it seeks to appeal granted its own motion to dismiss.

A

[3] "In a habeas corpus proceeding before a circuit or district judge, the *final order* shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." 28 U.S.C. § 2253 (emphasis added); *see also Blazak v. Ricketts*, 971 F.2d 1408, 1410 (9th Cir.1992) ("The settled rule in civil proceedings that we have jurisdiction over only final judgments applies to habeas proceedings."). The Supreme Court has instructed that "the finality requirement should be given a practical rather than a technical interpretation." *United States v. Lee*, 786 F.2d 951, 956 (9th Cir.1986) (*citing Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 310–11, 13 L.Ed.2d 199 (1964)). A final order is generally one that "ends the litigation and leaves nothing more for the court to do," *id.* (citations omitted), such that, "[u]nless the district court's order is overturned on appeal, nothing is left for the district court but to ensure the execution of its judgment," *Blazak*, 971 F.2d at 1411. Similarly, "an order which effectively sends a party out of court is appealable," *Lee*, 786 F.2d at 956; *see also Herrington v. County of Sonoma*, 706 F.2d 938, 939 (9th Cir.1983) (same), and "[a] decision is final for purposes of appeal if an appeal is the only method of obtaining review," *Lee*, 786 F.2d at 956.

[4] We do not agree with Farmer's argument that the district court dismissed only the petition. In terms, its order and judgment dismissed the action, and each of Farmer's three federal habeas petitions launched a new action, with a new number. *Proud v. United States*, 704 F.2d 1099, 1100 (9th Cir. 1983) (per curiam), upon which Farmer relies, is inapposite because the district court in *Proud* dismissed the complaint but not the action.

Regardless, Farmer contends, an order dismissing a complaint without prejudice is not final because it contemplates a new or amended filing. However, a dismissal "without prejudice" can be just as final as one "with prejudice" if it is "intended to end the litigation in the court involved but not to act as an adjudication on the merits or to bar the filing of a similar action in another court." *McGuckin v. Smith*, 974 F.2d 1050, 1053 (9th Cir.1992). Examples of such orders abound, including analogous dismissals for failure to exhaust administrative remedies, *see United States v. Orr Water Ditch Co.*, 914 F.2d 1302, 1306–07 (9th Cir.1990), and for failure to exhaust the grievance procedures under a collective bargaining agreement, *see Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 746–47 (9th Cir.1993). Dismissal of Farmer's amended third petition for failure to exhaust effectively terminated the litigation in district court, sending the parties out of the federal system. *See Quackenbush v. Allstate Insurance Co.*, — U.S. —, —, 116 S.Ct. 1712, 1716, 135 L.Ed.2d 1 (1996) (order remanding on abstention grounds is appealable as a final order because "it puts the litigants in this case effectively out of [federal] court"). This leaves nothing for the district court to do unless and until Farmer exhausts state court remedies and files a new action in federal court.

Nor do we believe that finality of the district court's order in this case can hinge on what might have happened if the court had considered the state's motion to dismiss for abuse of the writ, dismissing some but not all of the claims, and whether *that* order would be final. Farmer's reliance on *Bermudez v. Smith*, 797 F.2d 108 (2d Cir.1986), where the district court ordered dismissal of only four of seven claims alleged in the prisoner's habeas petition and the Second Circuit held that such an order of partial dismissal wasn't final, is misplaced because here the district court dismissed Farmer's entire petition. It is dismissal of the entire petition that is the final order, not the court's ruling (one way or the other) on the abuse of the writ issue.

Farmer finally contends that even though an order dismissing a petition as a "mixed" petition is a final order for jurisdictional purposes when it is the *prisoner* who is appealing, *see, e.g., Weaver v. Foltz*, 888 F.2d 1097 (6th Cir.1989) (reversing district court order dismissing a mixed petition, and directing the court on remand to address the merits of the exhausted claims); *Wise v. Fulcomer*, 958 F.2d 30 (3rd Cir.1992) (vacating district court order dismissing habeas petition for failure to exhaust state remedies, and directing the court on remand to decide whether the petition constitutes an abuse of the writ); *see also* 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 35.1, at 1050 (2d ed. 1994) ("[A]n order denying all the claims for relief in the petition or dismissing the petition as a whole ... [is] appealable."), it is final *only* when the prisoner appeals from it. This cannot be. An order is either final or not final, without regard to which party asks the court of appeals to review it. Our decision in *Confederated Salish v. Simonich*, 29 F.3d 1398 (9th Cir.1994), on which Farmer relies, does not suggest otherwise. We held in *Simonich* that an order denying a motion to dismiss under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), was not a final order. *Simonich* thus turns on the unremarkable rule that some orders are final—such as an "order abstaining under *Younger* and dismissing the case"—while some are not—like a district court's order that it "will *not* abstain under *Younger* and dismiss the case." *Id.* at 1401.[6]

We therefore hold that the district court's order dismissing Farmer's amended third habeas petition for his failure to exhaust state avenues of relief is a final order.[7]

B

Notwithstanding an appealable final order, an appeal may be taken only by those who have standing. Farmer contends that Nevada lacks standing, arguing only that this case parallels *Dolenc v. Love*, 40 F.3d 656 (3d Cir.1994). There, the Third Circuit dismissed Pennsylvania's appeal from an order that dismissed Dolenc's fourth habeas petition on exhaustion grounds. Pennsylvania complained on appeal that a renewed abuse of the writ plea to Dolenc's anticipated fifth petition would be barred on grounds of collateral estoppel or law of the case. Noting that Pennsylvania would have standing if it were correct that the district court's ruling would operate as law of the case, the Third Circuit couldn't see why the district court would be precluded from re-examining the issue. *Id.* at 657–58. The posture of this case and the position of the state on this appeal are different, however. Unlike the district court in *Dolenc*, the district court here did not rule on the merits of the state's motion to dismiss for abuse of the writ but rather concluded that it could not reach that issue as a matter of law because it had not previously disposed of Farmer's claims on the merits. Nevada complains on appeal that this ruling prevents it from getting a ruling on the merits of the abuse of the writ issue so long as Farmer continues to file unexhausted or mixed petitions, and prevented it from arguing for a dismissal with prejudice of Farmer's amended third petition. As it will never have another opportunity to have *that* decision reviewed, the state is sufficiently aggrieved by the district court's adverse ruling to have standing to appeal. *See, e.g., Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir.1981) (a defendant has standing to appeal from the grant of summary judgment for a codefendant, because in granting summary judgment the district court made a subsidiary ruling adverse to the appealing defendant); *LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119, 121–22 (7th Cir. 1988) ("For a prevailing defendant to appeal is unusual but not impermissible. Obviously,

6. This is not to say, of course, that every party to an action has the right to appeal from every final order. But the determination of *who* can appeal depends on principles of "standing" rather than of finality, which we address in Part IIB.

7. Because we hold that the order is final, we need not consider whether it is immediately appealable as a "collateral" order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

you can't appeal from a decision that is *entirely* in your favor.... But you can appeal from the parts of a generally favorable order that are unfavorable to you...."); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980).

We therefore conclude that we have jurisdiction, and now proceed to the merits.

III

[5] Nevada first argues that presentation of unexhausted claims in the amended third petition constituted an abuse of the writ and that the district court erred by failing to dismiss the petition as a whole as an abuse of the writ. We reject this argument, as it misapprehends the discretion that is reposed in district courts to decide whether there has been an abuse of the writ on a case-by-case basis. *See, e.g., Howard v. Lewis*, 905 F.2d 1318, 1321 (9th Cir.1990) (review of decision to deny consideration of habeas petition on the merits is for abuse of discretion); Habeas Corpus Rule 9, Advisory Committee Notes, at 801 ("bar set up by subdivision (b) [of Rule 9] is not one of rigid application, but rather is within the discretion of the courts on a case-by-case basis"). The state further asks us to require the district court to find that the presentation of unexhausted claims in the amended third petition is an abuse of the writ. This we also will not do. Rather, we consider only the narrow legal question of whether the district court correctly concluded that "although the *McCleskey* case is intolera[nt] of subsequent petitions, it deals with subsequent petitions after the first petition has been dismissed on the merits."

On this point, Nevada contends that Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C.A. foll. § 2254, covers those situations in which new claims are raised which were not raised in the first petition if the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ. While the state does not disagree that Farmer's amended third petition contains unexhausted claims that make it subject to dismissal under *Rose v. Lundy*, it argues that inquiry had to be made into whether the petition constitutes an abuse of the writ or is otherwise subject to dismissal with prejudice as a threshold matter before the district court could dismiss for lack of exhaustion. Nevada maintains that it adequately pled abuse of the writ by noting Farmer's prior writ history, which indicates that all 27 of the claims presented in Farmer's amended third petition appeared for the first time in that petition. From this, it posits that the amended third petition was filed only to vex, harass and delay the final adjudication of Farmer's state court judgment.

Farmer counters that the district court properly refused to dismiss his amended third petition because it is not a "second or successive one" within the meaning of 28 U.S.C. § 2244(b) and Rule 9(b). Instead, he submits, the defense of abuse of the writ arises only when there has been an adjudication of a previous federal petition on the merits.

A

"We look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *Alarcon v. Keller Indus., Inc.*, 27 F.3d 386, 389 (9th Cir.1994) (citations omitted). Rule 9(b) provides:

> **Successive Petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 U.S.C.A. foll. § 2254, Rule 9(b).[8]

By its terms, Rule 9(b) appears to contemplate two possibilities for dismissal of a second or successive petition: *one*, if the judge finds that it does not allege new or different grounds and the prior determination was on the merits; *the other*, if new and different grounds are alleged and the judge finds that the petitioner's failure to assert them in a prior petition was an abuse of the writ. Only the second clause is at issue here, as there is no contention in this case that the same grounds are alleged in the amended third petition as in any prior petition, or that there has been a prior merits determination on any of those grounds that precludes reexamination in the amended third petition.

Farmer says that Rule 9(b)'s reference to "second or successive petition" incorporates the concept of a prior merits determination into both clauses. But reading the Rule in this way would render the requirement in the first clause that "the prior determination was on the merits" redundant. We have difficulty reading the second clause as if it, too, includes a requirement that the prior petition (which did not include the grounds alleged in the subsequent petition) be a "prior determination on the merits." Literally, dismissal under this prong may occur if only two things are found: (1) new and different grounds are alleged and (2) the failure to assert those grounds in a prior petition constituted an abuse of the writ. Had Congress intended to limit the bases for dismissal of "new and different" grounds other than by what constitutes an abuse of the writ, it could have done so either by making the entire Rule applicable only if "the prior determination was on the merits" or by adding the phrase "determined on the merits" after the words "prior petition." Given how it is actually written, we cannot say that Rule 9(b) itself requires the prior petition that triggers abuse of the writ analysis to be one that was resolved on the merits.

The Advisory Committee Notes to Rule 9(b) indicate that the Rule distinguishes between "same ground" and "new and different" ground petitions on this basis. Habeas Corpus Rule, Advisory Committee Notes, 28 U.S.C.A. foll. § 2254, at 798. As the Notes explain:

> **Subdivision** (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable.
>
> In *Sanders v. United States*, 373 U.S. 1 [83 S.Ct. 1068, 10 L.Ed.2d 148] (1963), the court, in dealing with the problem of successive applications, stated: [9]
>
> > Controlling weight *may* be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. [Emphasis added.]
>
> 373 U.S. at 15 [83 S.Ct. at 1077]
>
> The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. § 2244(b) and has been reiterated in many cases since *Sanders*. ...
>
> With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:
>
> > In either case, full consideration of the merits of the new application can be avoided [only] if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
> >
> > Thus, for example, if a prisoner deliberately withholds one of two grounds for

8. Rule 1 provides that the Habeas Corpus Rules are applicable to petitions by persons in custody pursuant to a judgment of a state court. *See* 28 U.S.C. § 2254 Rule 1 ("[t]hese rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254 ... by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States"). Farmer is such a person.

9. Although *Sanders* was concerned with a motion by a federal prisoner under § 2255, rather than an application for a writ of habeas corpus by a state prisoner, the Court made clear that it was announcing principles that should be applied equally to all successive applications for federal habeas relief. *Sanders*, 373 U.S. at 15, 83 S.Ct. at 1077.

federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

373 U.S. at 17–18 [83 S.Ct. at 1078]

Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

. . . . .

Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled. However, in *Sanders*, the court pointed out:

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18 [83 S.Ct. at 1078]

Id. at 799–800.

Although Farmer correctly argues that a habeas petitioner may not be deprived of a hearing on the merits of his first federal habeas case for "equitable" reasons not founded in statute, rule and precedent, *Lonchar v. Thomas*, — U.S. —, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996), he offers no grammatically sensible way that Rule 9(b) can be read to treat the first prong—providing for dismissal for failing to allege "new and different grounds" when the prior determination was on the merits—the same as the second prong—providing for dismissal for alleging "new and different grounds" when failing to do so in a prior petition was abusive. Nor are we persuaded that interpreting Rule 9(b) as the Advisory Committee does would impermissibly conflict with § 2244(b), as Farmer suggests. While § 2244(b) is predicated on an adjudication of the merits,[10] Rule 9(b) was also enacted by Congress, after § 2244(b). 28 U.S.C. § 2244(b) (enacted in 1966); Habeas Corpus Rule 9(b) (promulgated in 1976); *see also Ritchie v. Eberhart*, 11 F.3d 587, 593 n. 3 (6th Cir.1993) ("The abuse of the writ doctrine is codified ... in two enactments of equal status: Rule 9(b) and 28 U.S.C. § 2244(b)."), *cert. denied*, 510 U.S. 1135, 114 S.Ct. 1111, 127 L.Ed.2d 422 (1994). To the extent there is a conflict, the most recently passed statute or rule prevails. *See Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir.1991) (holding that a federal rule of civil procedure prevails over an earlier passed but conflicting United States Code section because "[w]hen two statutes conflict the general rule is that the statute last in time prevails as the most recent expression of the legislature's will") (citation omitted); *International Union, United Auto., Aerospace & Agr. Implement Workers of America, Local 737 v. Auto Glass Employees Fed. Credit Union*, 72 F.3d 1243, 1247 (6th Cir.1996) (explaining that the basis for the rule that a later passed statute controls is the "settled principle of statutory construction that when Congress drafts a statute, courts presume that it does so with full knowledge of the existing law").[11]

10. Section 2244(b) states in full:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

11. Farmer suggests that interpreting "prior petition" as one not required to have been determined on the merits also conflicts with Rule 22–4(a) of the Ninth Circuit's capital habeas rules. Rule 22–4(a) provides:

> A "first petition" for habeas corpus ... shall mean: the original filing relating to a particular conviction or sentence, and a subsequent or amended filing if the original filing was dismissed on grounds other than on the merits. The term[ ] "first petition" ... shall not include: ... (ii) a petition for habeas corpus that has been dismissed by the district court for lack of jurisdiction.

6] As we read both its text and its histo- therefore, Rule 9(b) permits the district rt to dismiss a second or successive peti- if new and different grounds are alleged l the judge finds the failure of the peti- ier to assert those grounds in a prior ition, whether or not resolved on the mer- was abusive.

B

7] Nevada contends that Farmer has no hority for his position that abuse of the t analysis is inapplicable unless a prior ition has been determined on the merits, relies on *Sanders*, *McCleskey*, and *Bonin Vasquez*, 807 F.Supp. 586 (C.D.Cal.1992), argue that Farmer's second return from e court with unexhausted claims and no austed claims is abusive. However, the e devotes most of its argument to inexable neglect, unreasonable delay, and mer's inability to meet Nevada's cause prejudice standard upon return to state rt. These arguments have nothing to do whether Nevada's motion to dismiss for se of the writ was premature, as the rict court concluded, and we therefore do address them.[12] More to the point, mer argues that *McCleskey* abuse occurs after a federal court addresses the mer- f a previous petition, and that this circuit others, have so held. We disagree.

e see no inconsistency, as the second prong of le 9(b) has to do with alleging new and differt grounds from those alleged in a "prior peti- n" whereas Rule 22–4(a) has to do with assurg that a certificate of probable cause will be ued and a stay of execution will be in place til the death penalty panel issues its mandate the first petition addressed on the merits. othing we hold today affects application of the rcuit's automatic stay rules or implies that a titioner should not have "a single habeas peti- n," *see Rose v. Lundy*, 455 U.S. at 520, 102 Ct. at 1204, heard on the merits in federal urt.

In passing, both Nevada and Farmer remark the fact that, at the time the second federal tition was dismissed, *Neuschafer v. Whitley*, 0 F.2d 1470 (9th Cir.1988), *cert. denied*, 493 S. 906, 110 S.Ct. 264, 107 L.Ed.2d 214 (1989), as the law of the circuit and that under it, a ding of abuse of the writ would not have been atified solely on account of failure to include exhausted claims. *Id.* at 1476. Except to te that the district court's dismissal orders are

So far as we are aware, there is no dispositive authority one way or the other, though *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) comes quite close. As the Advisory Committee Notes to Rule 9(b) reflect,[13] the Court in *Sanders* distinguished two principles: a successive application on a ground heard and denied on the merits in a prior application, and abuse of the writ.[14] *Id.* at 10, 15–19, 83 S.Ct. at 1074, 1077–79. As the Court explained with respect to the successive application claimed to be an abuse of the writ:

> No matter how many prior applications for federal collateral relief a prisoner has made, the principle elaborated in Subpart A, supra [having to do with successive applications on grounds previously heard and determined on the merits] cannot apply if a different ground is presented by the new application. So too, it cannot apply if the same ground was earlier presented but not adjudicated on the merits. In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading.

Id. at 17, 83 S.Ct. at 1078. Sanders's initial petition—like Farmer's—had not been denied on the merits.[15] *Id.* at 19, 83 S.Ct. at 1079. Sanders's second application alleged a

entirely understandable responses to *Rose v. Lundy* (initial petition), *Neuschafer* (second petition), and *McCleskey* (third petition), we believe that the significance to Farmer's conduct of *Rose v. Lundy*, *Neuschafer*, *McCleskey*, and the various orders in this case, are for the district court, not us, to evaluate.

13. Quoted in full, *supra* at 1555–56.

14. We recognized both the distinction, and the fact that different standards determine when a court may dismiss a petition as abusive and when it may dismiss one as successive, in *Neuschafer*, 860 F.2d at 1474, n. 8.

15. The dissent reads *Sanders* differently, *infra* at 1562, but as the Court itself explained, Sanders's first petition "was denied because it stated only bald legal conclusions with no supporting factual allegations," and "the denial, thus based, was not on the merits. It was merely a ruling that [Sanders's] pleading was deficient." *Sanders*, 373 U.S. at 19, 83 S.Ct. at 1079.

new and different ground for relief (mental incompetency), which the district court denied without a hearing on the footing that "'there is no reason given, or apparent to this Court, why petitioner could not, and should not, have raised the issue of mental incompetency at the time of his first motion....'" *Id.* at 6, 83 S.Ct. at 1072. While holding that a hearing on the second application was required, *id.* at 20, 83 S.Ct. at 1079–80, the Court noted that "it will be open to the [government] to attempt to show that petitioner's failure to claim mental incompetency in his first motion was an abuse of the motion remedy, within the principles of *Wong Doo* and *Price v. Johnston*, disentitling him to a hearing on the merits." *Id.* at 21, 83 S.Ct. at 1080.[16] This could not have been an available option if, as Farmer contends, abuse of the writ cannot be triggered unless there has been a prior determination on the merits.

By contrast, the cases that Farmer calls to our attention have to do with subsequent petitions that involved challenges based on the "same ground," or "successive," part of *Sanders*.[17] These cases naturally cite, and rely on, the rules applicable to "same ground" successive petitions, including the requirement that there be a prior determination on the merits of the same ground against the petitioner. *Sanders*, 373 U.S. at 15, 83 S.Ct. at 1077. None limits the "new and different," or abusive part of *Sanders* to an earlier merits resolution; indeed, one case upon which Farmer relies, *Hamilton v. Vasquez*, 882 F.2d 1469 (9th Cir.1989), suggests that a petitioner *can* abuse the writ even though there has been no prior determination on the merits of a federal petition. Hamilton's first federal habeas petition was dismissed on the merits, but we reversed and ordered the petition dismissed without prejudice for failure to exhaust. Hamilton then brought a second federal habeas petition that alleged a new claim for relief. The district court rejected the state's alternative contentions that the petition should be dismissed as successive or abusive, and instead decided the merits of Hamilton's new claim against him without examining the state court record. *Id.* at 1470. We held that there was no same ground or successive petition problem, because Hamilton's first petition was dismissed without prejudice for failure to exhaust, and therefore "no federal court has yet addressed the merits of [Hamilton's] claim." *Id.* at 1473. But we also recognized that the absence of a prior merits determination wasn't dispositive of the state's alternative "abusive petition" argument, holding instead that the record did not

16. In *Wong Doo v. United States*, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999 (1924), the petitioner's first application for habeas corpus presented two grounds for relief. After a hearing, during which the petitioner offered no evidence to support his second ground, the district court denied relief because the first ground "was not good in law." *Id.* at 240, 44 S.Ct. at 525. The petitioner filed a second petition and relied entirely on the second ground. Finding no reason why the petitioner could not have presented evidence to support the second ground in the first habeas proceedings, the Court affirmed the district court's dismissal of the second petition, concluding that "[t]o reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*." *Id.* at 241, 44 S.Ct. at 525.

In *Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948), the petitioner's fourth habeas petition alleged a new claim, which the district court dismissed without a hearing on the ground that the petitioner had not raised the claim in his earlier petitions. *Id.* at 275–76, 68 S.Ct. at 1055–56. The Court explained that the new claim could be an abuse of the writ, and remanded to the district court to afford the government an opportunity to plead abuse with particularity, and to give the petitioner a chance to prove: (1) that he lacked any knowledge of the facts necessary to state the claim in one of his earlier petitions; or (2) if he had the knowledge, that he had an excuse for not asserting the claim. *Id.* at 291–92, 68 S.Ct. at 1062–63.

17. *See Hutchinson v. Craven*, 415 F.2d 278, 280 (9th Cir.1969) (per curiam); *Tatum v. Christensen*, 786 F.2d 959, 964 n. 6 (9th Cir.1986), *overruled in part on other grounds*, 802 F.2d 1539 (9th Cir.1986) (en banc); *Richmond v. Lewis*, 948 F.2d 1473, 1480–81 (9th Cir.1990), *rev'd on other grounds*, 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992); *Campbell v. Blodgett*, 997 F.2d 512, 515–17 (9th Cir.1992), *cert. denied*, 510 U.S. 1215, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1994); *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir.) (en banc), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990); *Potts v. Zant*, 734 F.2d 526, 528–29 (11th Cir.1984), *cert. denied*, 475 U.S. 1068, 106 S.Ct. 1386, 89 L.Ed.2d 610 (1986).

upport a finding that an abuse had in fact ccurred:

> A federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner (1) made a conscious decision deliberately to withhold them from a prior petition, (2) is pursuing needless piecemeal litigation, or (3) has raised the claims only to vex, harass, or delay. Where there is no affirmative indication in the record that the petitioner made a conscious decision deliberately to withhold his claim, proceed by piecemeal litigation, to vex or harass or annoy the court or the state, a second petition raising a new claim is not an abuse of the writ.
>
> The state has presented no evidence that any of the factors outlined in *Sanders* are present. Moreover, there is nothing in the history of this case to indicate that Hamilton deliberately withheld his claim in the hope of being granted two hearings instead of one.

. (citations omitted).

Farmer also argues that the state must ege that there was a prior proceeding on e merits as part of its burden to invoke the use of the writ doctrine, citing *Watkins v. ampion*, 39 F.3d 273 (10th Cir.1994). It is t clear to us where this comes from, as *itkins* simply says that, in accordance with *:Cleskey*, the government bears the burden pleading abuse of the writ, *id.* at 275, ich the government satisfies if it "notes itioner's prior writ history, identifies the ims that appear for the first time, and ges that petitioner has abused the writ." *Cleskey*, 499 U.S. at 494, 111 S.Ct. at 0.

dore critically, Farmer contends that *Cleskey* itself incorporates the necessity of rior proceeding on the merits of a previ- federal petition based on the emphasis t the Court gives to the burdens of "'re-examination of a conviction' following a first round of federal habeas litigation," as he puts it, and to "endless repetition of inquiry into facts and law," as the Court notes in quoting Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners", 76 Harv.L.Rev. 441, 452–453 (1963). *McCleskey*, 499 U.S. at 491–92, 111 S.Ct. at 1468–69.[18] From these concerns Farmer infers that the policies prohibiting repetitive examination of a state conviction do not apply when there has been no initial examination of the merits of the case by the federal court.

We do not read *McCleskey* as speaking to the point one way or the other. While there had been a prior determination on the merits in McCleskey's case, that wasn't a factor in the Court's decision about what standard should govern in abuse of the writ cases. But the Court's explanation for why it was appropriate to meld the standards for procedural default and abuse of the writ, and its focus on the petitioner's conduct, undermines the premise of Farmer's argument:

> The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding. The terms "abuse of the writ" and "inexcusable neglect," on the one hand, and "procedural default," on the other, imply a background norm of procedural regularity binding on the petitioner. This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas. A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion.... For these reasons, both the abuse-of-the-writ doctrine and our procedural default jurispru-

In the cited passage, the Court states:

> If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still. These later petitions deplete the resources needed for federal litigants in the first instance, including litigants commencing their first federal habeas action.... And if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition.

Id. at 492, 111 S.Ct. at 1469.

dence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.

Id. at 490, 111 S.Ct. at 1468 (citations omitted).

So does the Court's formulation of the question in abuse of the writ cases:

> Abuse-of-the-writ doctrine examines *petitioner's* conduct. The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process. The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition.

Id. at 498, 111 S.Ct. at 1472 (citations omitted). We thus do not agree with Farmer that *McCleskey* itself indicates that abuse can only occur as a matter of law after a federal court has addressed the merits of a previous petition.

[8, 9] We hold that a district court is not precluded as a matter of law from considering whether a petitioner has abused the writ by alleging in a subsequent federal habeas petition new and different grounds from those alleged in a prior federal habeas petition, whether or not that prior petition was determined on the merits. However, we emphasize how narrow this holding is. It does not mean that Farmer will never have any of his grounds heard on the merits in federal court. Claims that were presented in his initial and second federal habeas petitions but were not determined on the merits because they were unexhausted, are clearly outside Rule 9(b). Nevada acknowledges that all of Farmer's exhausted claims presented in the amended third petition should be heard, no doubt recognizing that a "single" federal petition filed after *Rose v. Lundy* exhaustion cannot be an abuse of the writ, as it is the very reason for dismissing the petition for failure to exhaust in the first place. Farmer's claims may not in any event be "new and different," or abusive. In short, what we hold, and all that we hold, is that the district court was not precluded as matter of law from considering whether Farmer's conduct in failing to allege grounds in prior petitions that he alleged the third time around (if he did) was abusive solely on account of the fact that his prior petitions were not reviewed on the merits.

Rather, the possibilities are as *Sanders* first articulated, Rule 9(b) sets out, the Advisory Committee Notes reflect, and as the Court restated in *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992):

> Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: (a) *successive claims* which raise grounds identical to grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised which constitute an *abuse of the writ;* or (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims. These cases are premised on our concerns for the finality of state judgments of conviction, and the significant costs of federal habeas review.

Id. at 338, 112 S.Ct. at 2518 (internal quotation and citations omitted).

IV

Accordingly, we reverse because Rule 9(b) and *McCleskey* do not foreclose entertaining the state's motion to dismiss for abuse of the writ solely because Farmer's prior petition had not been determined on the merits, as the district court concluded. We therefore vacate its order dismissing Farmer's amended third petition, and remand for it to consider the state's motion to dismiss for abuse of the writ. However, we express no opinion on whether the grounds alleged in Farmer's amended third petition are "new and different," or if they are, whether there has been any abuse of the writ. That is entirely for the district court to decide, in its discretion.[19]

19. Nevada alternatively asks us to conclude that the district court should have ruled that all 27 claims contained in Farmer's amended third petition are procedurally barred. But for the same

REVERSED; VACATED AND REMANDED.

SCHROEDER, Circuit Judge, concurring part and dissenting in part:

I concur in the holding that we have jurisdiction to consider the appeal, but I respectfully dissent from the majority's remand to the district court to consider possible abuse of the writ. The majority holds that inclusion of unexhausted claims in petitioner's third amended petition may constitute abuse, even though Farmer has never had a determination on the merits of any of his habeas claims. In my view, the district court has skillfully negotiated the hairpin turns in prevailing habeas corpus jurisprudence over the past decade in order to bring Farmer to the point where he can bring all of his claims to resolution in one petition. I would affirm the district court's order denying Nevada's motion to dismiss for abuse of the writ, for two reasons.

I.

First, even assuming the majority is correct in holding that there can be an abuse of the writ pursuant to Rule 9(b) of the Federal Habeas Corpus Rules when there has never been a prior adjudication on the merits, this particular case is not one in which such a finding of abuse could be made. There is no doubt Farmer's first two petitions containing exhausted claims were properly dismissed under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Pursuant to this court's then-controlling decision in *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988), the filing of a later petition in order to raise claims that had not been exhausted at the time a first federal petition was adjudicated could not, as a matter of law, have constituted an abuse of the writ because there had been no deliberate withholding of claims. Thus, after the dismissal of the second petition in this case, Farmer could have proceeded to have only his exhausted claims decided in a new petition without forfeiting unexhausted claims.

By the time Farmer filed his third petition, that law had changed. The Supreme Court had held in *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) that a petitioner who filed a second § 2254 petition raising a new claim not decided in his earlier petition had abused the writ. The petitioner would not be permitted to obtain a hearing on the merits of the new claim unless he established "cause and prejudice." The district court therefore correctly recognized that under *McCleskey*, once Farmer obtained a hearing on the merits of any of his claims, he could no longer easily return to federal court on a new petition raising claims that were not exhausted when the earlier petition was filed. This is why the district court gave Farmer six months to file a new federal petition raising all claims.

When that third amended petition still contained unexhausted claims that would require dismissal pursuant to *Rose v. Lundy*, the district court wisely, in my view, decided the proper course was to dismiss without prejudice and place strict time limits on the filing of a state court petition in order to allow the state courts to determine whether the unexhausted claims were valid, invalid or, as Nevada had insisted, procedurally barred.

Both the filing of the third amended complaint and the district court's dismissal of it without prejudice were done in accordance with prevailing law in order to satisfy the requirements of *Rose v. Lundy* and *McCleskey v. Zant*. There is no basis in this record to support the state's assertion that the third amended complaint was filed only to vex, harass, and delay. Indeed, the Supreme Court in *Sanders v. United States*, 373 U.S. 1, 22–23, 83 S.Ct. 1068, 1081, 10 L.Ed.2d 148 (1963) encouraged the district courts to refrain from deciding petitions on the merits until all possible claims were before them.

reasons we will not decide whether Farmer has in fact abused the writ, we decline to resolve this procedural default issue, and instead leave it to the district court on remand. *See Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir.1991) (deeming petition exhausted, and therefore properly dismissed, where petitioner's claims were now procedurally barred from presentation to state court); *see also Moran v. McDaniel*, 80 F.3d 1261, 1269–70 (9th Cir.1996) (rejecting an argument that Nevada's procedural bar rules are not adequate, and concluding that "the Nevada Supreme Court consistently applies its procedural rules to bar review of the merits of an untimely claim in the absence of a showing of cause and lack of prejudice to the State.").

That is exactly what the district court did in this case. The remand is unnecessary.

II.

Second, the district court in my view correctly held as a matter of law that there could not be an abuse of the writ under Rule 9(b) when there has never been an adjudication of any prior claim on the merits. In reversing, the majority correctly recognizes that Rule 9(b) was promulgated to reflect principles enunciated in *Sanders v. United States*, *supra*, but then gets *Sanders* wrong.

The majority's analysis depends on the premise that *Sanders* itself involved a case where a previous habeas petition had not been decided on the merits. *See* majority op., pp. 1557–58. I do not believe that premise is accurate.

Sanders involved a second petition. In his first petition, Sanders alleged that the indictment was invalid, that he was denied effective assistance of counsel, and that his guilty plea was involuntary. *Sanders*, 373 U.S. at 5, 83 S.Ct. at 1071. Sanders made insufficient factual allegations in support of his claims. *Id.*, 83 S.Ct. at 1072. The district court, however, did not simply deny the petition because of the absence of supporting factual allegations; it also held that the court records affirmatively refuted Sanders' three claims for relief. *Id.* That was an adjudication on the merits. See *id.* at 16, 83 S.Ct. at 1077, explaining that in order for there to be a ruling on the merits for abuse purposes, the court must either refute the allegations from its own records or hold a hearing. The Court said that an "adjudication on the merits" in a prior application means that "if factual issues were raised in the prior application," then either the application was "denied on the basis that the files and records conclusively resolved these issues," or "an evidentiary hearing was held." *Id.*

The concept of abuse of the writ is a subset of the larger realm of *res judicata* claim preclusion. While prior habeas determinations have less preclusive effect than ordinary judgments, they do have some preclusive effect. *See id.* at 8–11, 83 S.Ct. at 1073–75 (citing and discussing *Salinger v. Loisel*, 265 U.S. 224, 44 S.Ct. 519, 68 L.Ed. 989 (1924); *Wong Doo v. United States*, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed. 999 (1924); *Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948)). It is hornbook law that a prior judgment does not have preclusive effect unless it is a decision on the merits. *See* Restatement (Second) of Judgements §§ 13 & 20 (1982); *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466 n. 6, 102 S.Ct. 1883, 1889 n. 6, 72 L.Ed.2d 262 (1982). The Supreme Court underscored this point recently in *Felker v. Turpin*, — U.S. —, —, 116 S.Ct. 2333, 2340, 135 L.Ed.2d 827 (1996), where it stated that "restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" The majority decision is thus contrary to basic claim preclusion principles.

The majority's reliance on *Hamilton v. Vasquez*, 882 F.2d 1469 (9th Cir.1989), and *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), is not convincing. In *Hamilton* we did not, as the majority opinion states, "recognize[ ] that the absence of a prior merits determination wasn't dispositive of the state's alternative 'abusive petition' argument." Majority op. p. 1558. Instead, we decided the abuse of the writ argument on the merits because neither party raised the question whether there can be an abuse absent a prior adjudication on the merits. 882 F.2d at 1473. We did not deal with the issue presented here. The language quoted from *Sawyer*, on page 1560 of the majority's opinion, is not persuasive because *Sawyer* concerned the "miscarriage of justice" exception to the bar against consideration of successive claims, and not whether a successive claim may constitute an abuse of the writ. *Sawyer*, 505 U.S. at 339–40, 112 S.Ct. at 2518–19.

Apart from *Sanders*, neither the majority opinion nor the state cites any case in which it is even suggested that Rule 9(b) authorizes finding an abuse when there has been no prior decision on the merits. The principles enunciated in *Sanders* were drawn from an extensive discussion of prior cases, all of which considered an earlier decision on the merits to be a prerequisite to consideration of any government claim of abuse in a successive petition. In *Wong Doo v. United States*, 265 U.S. 239, 239–40, 44 S.Ct. 524, 25, 68 L.Ed. 999 (1924), the petitioner raised wo grounds for relief in his first federal abeas petition, but withheld any proof on he second ground and lost on the merits. ater, he filed a second petition, relying exlusively on the second ground alleged in the irst petition. *Id.* at 240, 44 S.Ct. at 525. 'he Supreme Court observed that petitioner ad not offered any "reason for not presentng the proof at the outset," and held that [t]o reserve the proof for use in attempting o support a later petition, if the first failed, as to make an abusive use of the writ of abeas corpus." *Id.* at 241, 44 S.Ct. at 525.

Price v. Johnston, 334 U.S. 266, 68 S.Ct. 049, 92 L.Ed. 1356 (1948), also involved a rior adjudication on the merits. In *Price*, ie petitioner raised a new claim for relief in is fourth successive federal habeas petition. *l.* at 286, 288–89, 68 S.Ct. at 1060, 1061–62. he Supreme Court remanded for a determiation of whether the petitioner abused the rit by failing to raise this new claim in his arlier petitions, two of which had been deied on the merits. *Id.* at 290–94, 68 S.Ct. at)62–1064.

In addition to *Wong Doo* and *Price*, the pinion in *Sanders* drew heavily from *Salinr v. Loisel*, 265 U.S. 224, 44 S.Ct. 519, 68 .Ed. 989 (1924), which also concerned sucssive federal habeas petitions. *See Sand*s, 373 U.S. at 8–9, 83 S.Ct. at 1073–74. *anders* noted that in *Salinger*, "[t]he petiioner's successive applications were properly enied because he sought to retry a claim reviously fully considered and decided gainst him." *Id.* at 9, 83 S.Ct. at 1074. The *alinger* Court observed that

[t]he action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it.

5 U.S. at 231–32, 44 S.Ct. at 522 (quoting *x parte Cuddy*, 40 F. 62, 66 (1889)). Clear, *Salinger*, like *Wong Doo* and *Price*, reuired a prior habeas adjudication on the erits.

Our overall concern should be with making abeas corpus procedures more efficient, orrly and understandable. The Supreme ourt and Congress have insisted that all abeas claims be consolidated insofar as practicable and that they be promptly resolved. The latter goal can never be achieved in this case. That is beyond our control. What is within our control is to let the district court proceed to adjudicate a consolidated petition. The majority refuses to do this and instead issues an open invitation to respondents in habeas cases to file more motions and to all parties to file more appeals. Let's stop making more work for the courts and doing less justice for litigants in habeas cases.

Because there is no factual basis to suggest the third amended complaint was filed for vexatious purposes, and for the independent reason that, as a matter of law, I believe the district court correctly recognized there can be no abuse under Rule 9(b) unless there has been a prior adjudication on the merits, I respectfully dissent from the order remanding for a determination of whether there has been an abuse of the writ.

APPLIED MATERIALS, INC.,
Plaintiff/Cross–Appellant,

v.

ADVANCED SEMICONDUCTOR MATERIALS AMERICA, INC. and Epsilon Technology, Inc., d/b/a ASM Epitaxy, Defendants–Appellants,

and

Advanced Semiconductor Int. N.V., Defendant.

Nos. 94–1428, 94–1466.

United States Court of Appeals, Federal Circuit.

Oct. 24, 1996.

Rehearing Denied; Suggestion for Rehearing In Banc Declined Dec. 17, 1996.*

Patentee brought action against competitor, alleging infringement of patents relating

*Chief Judge Archer would rehear the appeal.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ANTONIO T. SLACK,

Petitioner,

vs.

DIRECTOR, NDOP, et al.,

Respondents.

Case No. CV-N-95-194-DWH

OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL

Respondents, by an through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, oppose petitioner's motion for appointment of counsel.

This opposition is made and based on the attached points and authorities as well as all other pleadings, documents and exhibits on file in the above-entitled matter.

POINTS AND AUTHORITIES

Petitioner Antonio T. Slack (hereinafter SLACK) has filed a motion for counsel stating that he is illiterate. This assertion is belied by the pleadings that Slack has already filed in this matter. Slack acknowledges that he is receiving the benefit of the services of inmate law clerks. He is entitled to nothing more. Whether his claims have merit or not is up to this Court to determine. Slack is not constitutionally entitled to counsel in this proceeding and he has advance no reason why he can not litigate the matter himself. Respondents respectfully suggest that this Court should not waste scarce judicial resources.

RESPECTFULLY SUBMITTED this 7th day of July, 1995.

FRANKIE SUE DEL PAPA
Attorney General

By: Robert E. Wieland
Robert E. Wieland
Deputy Attorney General
Criminal Justice Division
(702) 687-3529

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 10th day of July, 1995, I served a copy of the foregoing OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL, by mailing a copy thereof to:

ANTONIO T. SLACK, #31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

Dani L Doty

98-6322

CASE NO._____

CASE CODE CFH

DATE DOCKETED 10-5-98

SHORT TITLE_____

FULL TITLE _____

COURT FROM 9CAP9

DATE DECIDED BELOW 7-7-98

DATE REHARING DENIED_____

DATE DR. DENIED_____ DATE DR REH DENIED_____

CASE NUMBER BELOW 98-15943

OTHER COURT USNV

CAPITAL CASE_____

TIME QUESTION_____

APPLICATION EXTENSION_____ CITED __Y ___N_____

RULE 12.2_____

DKT LETTER NOTATION_____ SERVE SG_____

MULTI PARTY_____ TS_____ BS_____

RELATED CASE SCHEDULED FOR CONFERENCE_____

RELATED CASE NO. HAS BEEN DENIED_____

VIDE_____

THE PETITION FOR A WRIT OF CERT WAS DUE_____

BECAUSE THE PETITION WAS POSTMARKED_____

AND RECEIVED _____ IT WAS DOCKETED WITH

A NOTATION AS TO ITS UNTIMELINESS.

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
DEC 10 1998
CLERK

No. 98-6322

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANTONIO T. SLACK,

Petitioner,

v.

E. K. MC DANIEL, Warden, Ely (Nevada) State Prison, and
FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FRANKIE SUE DEL PAPA
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SUPREME COURT, U.S.

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76 F.3d 820 (7th Cir. 1996) 9

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No. 98-6322

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANTONIO T. SLACK,

Petitioner,

v.

E. K. MC DANIEL, Warden, Ely (Nevada) State Prison, and
FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

COME NOW, Respondents E.K. McDANIEL, Warden; and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and file this brief in opposition to the petition for a writ of certiorari submitted by Antonio TonTon Slack (Slack).

I.

OPINIONS AND JUDGMENTS BELOW.

The Opinion of the Federal District Court for the District of Nevada was filed March 31, 1998. (App. 1.)[1] The Order of the United States Court of Appeals for the Ninth Circuit was filed on July 7, 1998. (App. 2.)

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[1] All references to an appendix are to the appendix submitted with Mr. Slack's Petition for Writ of Certiorari.

II.

JURISDICTIONAL STATEMENT

28 U.S.C. §1254 confers jurisdiction upon this Court to review the order of the United States Court of Appeals for the Ninth Circuit denying Slack's request for a certificate of probable cause to appeal.

III.

STATEMENT OF THE CASE

In 1990, a Nevada jury convicted Petitioner Slack of second degree murder with the use of a deadly weapon. Slack was sentenced to life with the possibility of parole for the murder. That sentence was enhanced with a consecutive sentence of life with the possibility of parole for the use of a deadly weapon during the commission of the crime. (App. 3.) Slack appealed his conviction to the Nevada Supreme Court and raised the following issues: there was insufficient evidence adduced at his trial to convict him; the trial court improperly allowed evidence of a sexual relationship between Slack and his twelve-year-old victim; the reasonable doubt jury instruction given at his trial violated the due process clause of the United States and Nevada constitutions; and the trial court erred by not adequately defining premeditation in the jury instructions. The Nevada Supreme Court dismissed Slack's appeal. (App. 4.)

On November 27, 1991, Slack filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 by a Person in State Custody in the United States District Court for the District of Nevada. In his first federal petition Slack raised the following issues: there was insufficient evidence adduced at trial to convict him of Second Degree Murder; the trial court improperly allowed evidence of a sexual relationship between Slack and the twelve-year-old victim; the reasonable doubt instruction given at his trial violated the due process clause of the United States and Nevada constitutions; and the trial court erred by not adequately defining premeditation in the

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jury instructions regarding murder. (App. 5.) On February 19, 1992, Slack's first federal habeas petition was dismissed without prejudice so that he could exhaust his state remedies. (App. 7.)

On July 10, 1992, Slack filed a state petition for writ of habeas corpus (post-conviction) in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. In his petition Slack claimed as Ground One that he was denied the effective assistance of counsel during pre-trial and trial proceedings, because his counsel: 1) failed to find out what kind of deal was made with Kamal Bey;[1] 2) failed to file a pre-trial motion in limine to stop the introduction of prior sexual relations with the victim; 3) failed to file a pre-trial motion in limine to stop the testimony of Kamal Bey because as his deal was based on his trial testimony; 4) failed to interview Slack's brother to refute the testimony of Kamal Bey; 5) failed to ask Kamal Bey what deals he made with the state for his testimony; 6) failed to request an accomplice testimony instruction; 7) failed to have presented to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey; and 8) these alleged errors prejudiced him.

As Ground Two, Slack claimed that he had ineffective assistance of counsel on his direct appeal because his appellate counsel: 1) failed to raise a *Franklin*[2] violation on appeal; 2) failed to raise the issue that his trial counsel failed to request an accomplice instruction; 3) failed to raise the issue that Kamal Bey was a co-defendant and his testimony was questionable; and 4) failed to raise the issue of prosecutorial misconduct when the prosecutor failed to inform the jury that Kamal Bey was a co-defendant as well as the fact that Bey's fingerprints were the only fingerprints found on the murder weapon.

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[1] Kamel Bey, alleged by Slack to be an accomplice, was charged as an accessory to murder in juvenile court. (App. 8, pg 29.)

[2] *Franklin v. State*, 94 Nev. 220, 577 P.2d 860 (1978), sets forth the requirements for testimony of an accomplice pursuant to a plea agreement.

As Ground Three, Slack claimed that the trial court deprived him of his rights under the Sixth and Fourteenth Amendments to a fair and impartial trial when the court failed to properly instruct the jury on accomplice testimony and the trial court improperly instructed the jury on premeditation. As Ground Four, Slack claimed that the prosecutor committed misconduct by withholding from the jury the fact that the only fingerprints found on the murder weapon were those of Kamal Bey and that he was a co-defendant in the case. (App. 9.)

On February 11, 1993, the state district court denied Slack's petition for post-conviction relief. (App. 8.) Slack appealed and on December 30, 1993, the Nevada Supreme Court dismissed his appeal. (App. 9.) The Nevada Supreme Court found that Slack's claims were repelled by the record. Specifically, the Nevada Supreme Court found the terms of the state's agreement with Bey were fully disclosed to the jury. The Nevada Supreme Court found that Slack's theory of the case was that he accidentally shot the victim and noted that Slack testified that his finger was on the trigger when the gun fired. Therefore, it was irrelevant that Bey's fingerprints were found on the weapon. The Nevada Supreme Court also found that Bey was neither an accomplice nor a co-defendant and Slack was not prejudiced by the lack of an accomplice testimony instruction. The Nevada Supreme Court also noted that the remaining claims were similarly repelled by the record. *Id.*

Slack returned to federal court in March, 1995, and filed his second Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the District of Nevada. After various procedural motions, Slack was appointed counsel and filed a third amended petition for writ of habeas corpus. In his third amended petition Slack alleged the following grounds: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 2) Petitioner was denied his right to due process under the Fifth and Fourteenth Amendments because he was charged with "open murder" in an information which did

not properly plead each element of first degree murder which failed to impart sufficient notice to him; 3) The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 4) The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution; 5) Petitioner was denied effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; 6) Petitioner was denied effective assistance of appellate counsel in violation of the Sixth Amendment; 7) The doctrine of cumulative error mandates relief. (App. 15.)

Respondents, alleging that Slack's petition contained unexhausted grounds and constituted an abuse of the writ under Rule 9(b) of the Rules Governing §2254 Cases in the United States District Courts, moved to dismiss Slack's third amended petition. (App. 16.) The federal district court ordered Slack to attempt to demonstrate cause and prejudice to overcome the abuse of the writ bar that applied to grounds two, four(c), five, six, and seven of his third amended petition. (App. 18.) Rather than attempt to show cause and prejudice, Slack filed a motion for reconsideration of the federal district court's order. (App. 19.) The federal district court denied Slack's motion for reconsideration and dismissed, with prejudice, grounds two, four(c), five, six and seven of his third amended petition as abusive. The federal district court also found that Slack's claim in ground three was unexhausted and, based on *Rose v. Lundy*, 455 U.S. 509 (1982), dismissed his federal action. (App.1.)

On May 19, 1998, the federal district court denied Slack's request for a certificate of probable cause to appeal. (App. 22.) On July 7, 1998, the United States Court of Appeals for the Ninth Circuit also denied Slack's request for a certificate of probable cause. (App. 2.)

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IV.

REASONS FOR DENYING THE WRIT

A. Introduction.

Review on a writ of certiorari is not a matter of right, but of judicial discretion which will be granted only for compelling reasons. Sup. Ct. R. 10. In considering whether to grant certiorari pursuant to Sup. Ct. R. 10, while neither controlling or fully measuring this Court's decretion, this Court may consider whether: (a) the Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted an usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power; or (b) whether the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10.

Slack requests this Court grant certiorari, vacate the judgment below and remand for further proceedings to allow the Ninth Circuit to consider this Court's decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998). In the alternative, Slack requests this Court grant his petition for review to resolve an alleged split of authority among the United States courts of appeals regarding whether the provisions of Rule 9(b), governing second and successive petitions, is properly invoked when the prior federal habeas petition was not decided on the merits. As will be shown below, *Stewart v. Martinez-Villareal, supra*, does not apply to the facts of this case and there is no split of authority among the United States courts of appeals which would warrant this Court's consideration.

B. This Court Should not Grant the Petition, Vacate the Judgment and Remand for Further Proceedings because *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998), does not apply to the facts of this case.

The federal district court dismissed most of Slack's claims as an abuse of the writ relying on this Court's decision in *McCleskey v. Zant*, 499 U.S. 467 (1991) and the Ninth Circuit's decision in *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996). Slack now argues that this Court's decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998), has abrogated *Farmer*. Therefore, Slack, has asked this Court to issue an order granting his petition, vacating the judgment below and remanding for further proceedings (hereinafter GVR order).

This Court has stated that a GVR order is potentially appropriate in the following limited circumstances:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Lawrence v. Chater, 516 U.S. 163, 167 (1996).

In this case, this Court's decision in *Stewart* has no application to the facts of *Farmer*. Therefore, there is no reason for this Court to remand for further proceedings. In *Farmer*, the Ninth Circuit determined that the abuse of the writ analysis under Rule 9(b) applies to new claims raised in a subsequent petition whether or not the first petition was determined on the merits. In *Stewart*, this Court decided whether Martinez-Villareal's claims brought under the authority of *Ford v. Wainwright*, 477 U.S. 399 (1986), were subject to the restrictions on "second or successive" applications for federal habeas relief found in the newly revised 28 U.S.C.§2244 (Supp. 1997), the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA). *Stewart* at 1619. Slack initiated his action in the federal district court prior to the effective date of AEDPA. *Stewart* involves the interpretation of a statute that is not applicable to this case. Therefore, *Stewart* has no applicability to this case.

In addition, the result in *Stewart* turned on the nature of the claim involved, that is, that Martinez-Villareal was incompetent to be executed. The claim was not ripe for consideration in the first habeas action filed in federal court, although the claim was raised in his initial federal petition. In *Stewart*, this Court stated:

> Later, in *Rose v. Lundy*, 455 U.S. 509, 522, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982), we went further and held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." But none of our cases expounding this doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

Stewart at 1622.

In this case, Slack's first federal petition was dismissed in order for him to exhaust state remedies. Slack returned to state court and raised the claims he failed to exhaust in his first federal petition. Slack then returned to federal court and filed a successive petition raising brand new unexhausted grounds. It was Slack's new, unexhausted grounds which the federal district court properly found constituted an abuse of the writ pursuant to Rule 9(b).

The facts of this case are materially different from the facts of the *Stewart* case. This Court's opinion in *Stewart* simply does not apply to Slack's case. Therefore, there is not a reasonable probability that the Ninth Circuit would reconsider the district court's decision. Therefore, a GVR order is not appropriate and should not be issued by this Court.

C. There is no Split of Authority among the United States Courts of Appeals regarding whether the Provisions of Rule 9(b) Governing "Second or Successive" Petitions Applies when the Prior Petition was not Determined on the Merits.

Slack also argues that this Court should grant review because the Ninth Circuit's decision in this case and in *Farmer* have created a split in authority among the circuits as to whether Rule . . .

9(b) applies to a successive petition when the prior petition was not decided on the merits. There is no such split of authority.

Slack first cites *Dellenbach v. Hanks*, 76 F.3d 820 (7th Cir. 1996). However, *Dellenbach*, involved an analysis under former 28 U.S.C. §2244(a) and (b) in a case where the district court had summarily dismissed the habeas petition. The Seventh Circuit's analysis turned on the express language of former 28 U.S.C. §2244(a) and did not even mention Rule 9(b). Slack next cites *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1990), however, abuse of the writ is not mentioned anywhere in the Eighth Circuit's opinion.

Slack also points to the Fifth Circuit's decision in *Woods v. Whitley*, 933 F.3d 321 (5th Cir. 1991). Woods involved an abuse of the writ analysis regarding the petitioner's third federal habeas petition. Woods first federal petition was dismissed for failure to exhaust and his second was decided on the merits. *Woods* at 322. Although it is unclear from the decision it appears that Woods returned to federal court with fully exhausted claims in his second petition. Woods third petition was denied as an abuse of the writ. *Woods* at 324-325. Not one of these cases is on point with this case. Slack's first federal petition was dismissed to exhaust state remedies and then, rather than exhausting all of his claims, Slack returned to federal court with brand new unexhausted grounds which had never been presented anywhere (not even state court) before.

Slack also lists the following cases in support of his argument that there is a split in the circuits: *In re Wilson*, 142 F.3d 939 (6th Cir. 1998); *McWilliams v. State of Colorado*, 121 F.3d 573 (10th Cir. 1997); *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997); *Christy v. Horn*, 115 F.3d 201 (3rd Cir. 1997); *Benton v. Washington*, 106 F.3d 162 (7th Cir. 1996); *In re Turner*, 101 F.3d 1323 (9th Cir. 1997); *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996); *Camarano v. Irvin*, 98 F.3d 44 (2nd Cir. 1996). These cases do not contain an abuse of the writ analysis. In every one of these cases the court was analyzing 28 U.S.C. §2244, as amended by AEDPA, to determine whether a petitioner must request permission from the circuit court before filing a second petition

in federal district court, when the first petition was dismissed without prejudice. AEDPA does not apply to Mr. Slack's case. In fact, former 28 U.S.C. §2244 is not at issue in Slack's case. These cases do not support Slack's argument that the Ninth Circuit's decision in his case and in *Farmer* has created a split among the circuit courts.

There is no split among the circuit courts. Therefore, Slack has not presented any reason to justify this Court's granting of plenary review.

V.

CONCLUSION

For the foregoing reasons, this Court should not grant Slack's petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 10th day of December, 1998.

FRANKIE SUE DEL PAPA
Attorney General

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* Attorney of Record

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO T. SLACK, Petitioner, vs. E. K. MC DANIEL, Warden, Ely (Nevada) State Prison and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, Respondents.	Case No. 98-6322 **CERTIFICATE OF SERVICE**

I, DAVID F. SARNOWSKI, one of the attorneys for the Respondents in the above-entitled proceeding, E. K. MC DANIEL and FRANKIE SUE DEL PAPA, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 10th day of December, 1998, I caused to have copies of the BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI mailed as noted below in duly addressed envelopes, with first-class postage prepaid, to each person below. All of the following parties have been served and this mailing occurred within the time permitted under the Rules of the Supreme Court of the United States.

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SUPREME COURT, U.S.

WILLIAM K. SUTER, Clerk
Supreme Court of the United States
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Supreme Court, U. S.
FILED
DEC 16 1998
CLERK

No. 98-6322

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANTONIO TONTON SLACK, Petitioner

v.

E.K. MCDANIEL, WARDEN, ELY, (NEVADA) STATE PRISON
and FRANKIE SUE DEL PAPA, ATTORNEY
GENERAL OF THE STATE OF NEVADA, Respondents

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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* Counsel of Record for Petitioner

No. 98-6322

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANTONIO TONTON SLACK, Petitioner

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REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FRANNY A. FORSMAN
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* Counsel of Record for Petitioner

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III. IF IT DOES NOT SUMMARILY REMAND THIS MATTER TO THE COURT OF APPEALS, THIS COURT SHOULD GRANT PLENARY REVIEW TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE UNITED STATES COURTS OF APPEALS REGARDING WHETHER THE PROVISIONS OF RULE 9(B) GOVERNING "SECOND OR SUCCESSIVE" PETITIONS MAY BE PROPERLY INVOKED PRIOR TO THE COMPLETION OF THE "FIRST FULL ROUND" OF HABEAS CORPUS PROCEEDINGS 8

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I.

INTRODUCTION

Mr. Slack demonstrated in his certiorari petition how the Ninth Circuit's construction of "second or successive" habeas corpus petition is irreconcilable with this Court's interpretation of the same term in Stewart v. Martinez-Villareal, __ U.S. __, 118 S.Ct. 1618 (1998) – an intervening decision which the Ninth Circuit did not have the opportunity to consider when it denied a certificate of probable cause here and also when it issued Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996). The certiorari petition also showed that by applying McCleskey v. Zant, 499 U.S. 467 (1991) "abuse of the writ" standards to Mr. Slack's petition, and by labeling Mr. Slack's current petition as "second or successive" -- even though Mr. Slack's case is indisputably still undergoing the "first round" of federal habeas corpus review because his previous federal habeas corpus petition was dismissed without prejudice for exhaustion -- the Ninth Circuit issued an aberrant ruling that conflicts with all other court of appeals decisions. Even worse, the district court and the Ninth Circuit, by denying a certificate of probable cause in this case, totally prevented any examination of this issue despite the uniformly contrary decisions of other circuits as to what constitutes a "second or successive" petition.

The precise issue presented is accordingly whether, in light of this Court's intervening guidance in Martinez-Villareal, and the uniformly contrary construction of the term "second or successive" by the other courts of appeals, Mr. Slack's case presents a question that is "debatable among jurists of reason," which is all that is required to entitle him to a certificate of probable cause. E.g., Lozada v. Deeds, 495 U.S. 430, 432 (1991) (per curiam); Barefoot v. Estelle, 463 U.S. 880, 892-893 (1983). Mr. Slack's certiorari petition demonstrated why the answer to this question is "yes," and also submitted two alternative ways in which, consistent with prudential limitations on

this Court's review, the Ninth Circuit's fundamental error could be remedied: (1) Through the issuance of a summary grant, vacate and remand order, which would allow the Ninth Circuit to reconsider its ruling after full briefing concerning the controlling standards set forth by this Court in Martinez-Villareal; or (2) Through the grant of plenary review, which would allow this Court to address the split of authority created by the Ninth Circuit's unprecedented ruling.

In its opposition, the State of Nevada does not dispute the bulk of Mr. Slack's arguments. Indeed, the State does not even attempt to defend the fact that the Ninth Circuit's ruling rests on the premise that the issue presented by Mr. Slack is not even "debatable among jurists of reason." What is more, the State agrees that the Ninth Circuit did not have the benefit of this Court's ruling in Martinez-Villareal when it refused to allow Mr. Slack even to pursue an appeal, and the State agrees that an intervening decision of this Court provides the proper basis for issuance of a GVR order. Moreover, the State essentially agrees that the Ninth Circuit in Farmer construed "second or successive" differently than this Court did in its intervening decision in Martinez-Villareal. Nonetheless, the State argues that the Ninth Circuit should not even be given the opportunity to reconsider its contrary interpretation of the exact same term because the Martinez-Villareal court's ruling involved the provisions of the Anti-Terrorism and Effective Death Penalty Act, while Mr. Slack's case involved the functionally identical provisions in the Rules Governing Section 2254 Cases. The State similarly asserts that the Ninth Circuit's unprecedented ruling does not create a "split" of authority because, although the Ninth Circuit construed the term "second or successive" in a way that conflicts with both Martinez-Villareal and the decisions of virtually every other circuit, the other cases involved different narrow factual scenarios.

None of the State's contentions can withstand analysis. This case indisputably involves the same language and policy interests at issue in Martinez-Villareal, and the State has failed to provide

a single reason why identical pre-AEDPA language could be construed as containing more severe restrictions than its post-AEDPA counterpart. The reason for this omission, moreover, is plain: This Court's opinion in Martinez-Villareal allows only one proper construction of the term "second or successive" in all habeas corpus cases, and it is not the construction the Ninth Circuit has chosen. Specifically, Martinez-Villareal will not permit the term "second or successive" to include petitions, like Mr. Slack's, that have never received adjudication, and certainly will not permit the application of draconian McCleskey abuse of the writ standards to such petitions. Because the Ninth Circuit misconstrued the term "second or successive" in a way that is fundamentally irreconcilable with intervening authority of this Court and with the decisions of every other circuit to consider the issue, this Court should grant Mr. Slack's petition.

II.

THIS COURT SHOULD GRANT THE PETITION, VACATE THE JUDGMENT AND REMAND FOR FURTHER PROCEEDINGS, WHERE THE LOWER COURTS DID NOT CONSIDER THIS COURT'S INTERVENING DECISION IN STEWART V. MARTINEZ-VILLAREAL, U.S. , 118 S.CT. 1618 (1998),WHICH COMPLETELY UNDERMINES THE ANALYTICAL BASIS FOR THE LOWER COURTS' ORDERS IN THIS CASE.

As noted, the State of Nevada and Mr. Slack are essentially in agreement that this Court's decision in Martinez-Villareal is the type of intervening development that would justify issuance of a GVR order. See Opp. at 7; and see Lawrence v. Chater, 516 U.S. 163, 166-67 (1996). The State further acknowledges, as it must, that Martinez-Villareal construed the same "second or successive" language relied on by the lower courts in holding that Mr. Slack's claims were precluded under Rule 9(b) of the Rules That Govern Section 2254 Cases. Nonetheless, the State asserts that this Court should not issue a GVR order because "there is not a reasonable probability that the Ninth Circuit would reconsider the district court's decision." Opp. at 8. This contention cannot withstand

scrutiny.

The State first attempts to minimize Mr. Slack's likelihood of success on remand because "Stewart involves the interpretation of a statute that is not applicable to this case." Opp. at 7. Although the State does not say so explicitly, what the State apparently means by this argument is that it believes that the Ninth Circuit has intentionally – although not expressly – adopted a different definition of the term "second or successive" under Rule 9(b) than the one this Court adopted in Martinez-Villareal under 28 U.S.C. § 2244(b), and that the Ninth Circuit's decision to do so was proper. But the State fails to provide a shred of support for construing these identical terms differently, and without such support its position cannot prevail. The controlling law is clear that terms that have acquired a legal meaning are always construed to mean the same thing in the absence of compelling evidence to the contrary. E.g., Bradley v. United States, 410 U.S. 605, 609 (1973). Here, there is no evidence whatsoever that Congress intended the term "second or successive" to have different meanings in Rule 9(b) and 28 U.S.C. § 2244(b), and nothing in Martinez-Villareal would support giving the same language two radically different meanings. Moreover, the lower courts that have expressly addressed the issue have unanimously agreed that the terms should be construed the same way:

> Although the AEDPA's amendment to § 2244 imposes stricter requirements for 'second or successive' petitions than the pre-AEDPA 'abuse of the writ' standard in Rule 9(b), nothing in the AEDPA affects the determination of what constitutes a 'second or successive' petition.

In Re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997); accord Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996)("The 1996 legislation jettisons the concept of abuse of the writ in favor of more restrictive standards; it preserves the concept of the 'second or successive' petition. These words

therefore retain the same meaning they had under Rule 9(b).")[1] In fact, in a recent *en banc* opinion, the Ninth Circuit has now held that "abuse of the writ evolved as a judicially created equitable doctrine, but is now codified by the AEDPA." Calderon v. United States District Court (Kelly), __ F.3d __, 1998 WL 848032 *9 (December 8, 1998) (*en banc*). This recent *en banc* ruling establishes that, if this Court remands to the Ninth Circuit for reconsideration of whether the definition of "second or successive" under the old act is the same as the definition of that term set forth in Martinez-Villareal, Mr. Slack will likely prevail.

The State next attempts to minimize Mr. Slack's likelihood of success on remand by drawing narrow factual distinctions between this case and Martinez-Villareal; this attempt too must fail because, on a fundamental level, the State's opposition simply refuses to acknowledge both the holding and the language in Martinez-Villareal. For example, the State attempts to distinguish Martinez-Villareal as "turning on the nature of the claim involved, that is, that Martinez-Villareal was incompetent to be executed." Opp. at 8. But this Court in Martinez-Villareal did not draw any distinction on the basis of why the claim "could not have been adjudicated in [a] prior petition." See

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[1] As Mr. Slack explained in his petition, interpreting "second or successive" under Rule 9(b) consistently with this Court's definition of "second or successive" petition in Martinez-Villareal is also necessary to avoid absurd results which were obviously not intended by Congress. See United States v. Turkette, 452 U.S. 576, 580 (1981)(interpretation of enactments to avoid absurd results). Such an absurd result would arise by virtue of the fact that, under the State's position, which was adopted by the lower courts here and in Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996), a litigant like Mr. Slack, whose petition is subject to the supposedly more lenient pre-AEDPA standards, has had his claims barred by an application of the "second or successive" abuse doctrine to a petition that would not be "second or successive" at all under the new act. This would be directly contrary to the intent of Congress in adopting 28 U.S.C. § 2244(b), which was to supersede the abuse of the writ doctrine and replace it with "further restrict[ions]", Felker v. Turpin, 518 U.S. 651, 664 (1996), on the filing of "second or successive" petitions. Id.; Benton v. Washington, 106 F.3d at 164 ("The 1996 legislation jettisons the concept of abuse of the writ in favor of **more restrictive** standards"(Emphasis supplied.))

Gretzler v. Stewart, 146 F.3d 675, 676 (9th Cir. 1998). To the contrary, this Court explicitly equated the inability to adjudicate the Ford claim in Martinez-Villareal, because of its general unripeness, with the inability to adjudicate any claim in a mixed petition, because of the complete exhaustion rule of Rose v. Lundy, 455 U.S. 504, 522 (1982). 118 S.Ct. at 1622; see Martinez-Villareal v. Stewart, 118 F.3d at 633. The court's analysis equated them because "in both situations, the habeas petitioner does not receive an adjudication of his claim." 118 S.Ct. at 1622. This Court also made it clear that no res judicata effect attaches to a dismissal of a previous petition without prejudice for exhaustion, when it held that the Ford claim could be addressed on the merits because it "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies." Martinez-Villareal, 118 S.Ct. at 1622. [2]

This Court's focus in Martinez-Villareal on the lack of adjudication of the claim in the prior petition is also entirely consistent with the Court's abuse analysis in McCleskey v. Zant, 499 U.S. 467 (1991). There, the Court imposed strict standards on the consideration of a "second or successive" petition, precisely because of the "vital relevance" of a "prior adjudication" of a habeas corpus petition. 499 U.S. at 482. Just as in McCleskey, the court in Martinez-Villareal focused on the absence of a prior adjudication of the claim, which was not affected by its previous dismissal without prejudice, in concluding that the renewed application was not a "second or successive" one. The basic problem with the Ninth Circuit's analysis (both here and in Farmer) is that it erases the

---

[2] See e.g. Cooter & Gell v. Hartman Corp., 496 U.S. 384 (1990) (no bar to a second action after first was dismissed without prejudice); Lexecon v. Milberg Weiss, 102 F.3d 1524 (9th Cir. 1996) ("We have held that a dismissal without prejudice lacks res judicata effect."), rev'd on other grounds, 118 S.Ct 956 (1998); In re Corey, 892 F.2d 829, 835 (9th Cir. 1989) (presuming that silent dismissal order is without prejudice and explaining that "dismissal order therefore has no res judicata effect.") cert. denied, 498 U.S. 815 (1990); Humphreys v. United States, 272 F.2d 411, 412 (9th Cir. 1959) ("a suit dismissed without prejudice pursuant to Rule 41(a)(2) leaves the situation the same as if the suit had never been brought in the first place.").

distinction between a petition dismissed "without prejudice" for exhaustion and a petition fully adjudicated on the merits, by characterizing a later petition in both situations as a "second or successive" one, and thus accords a preclusive effect under the abuse doctrine to both kinds of initial petitions. The decision in Martinez-Villareal characterized this position as "seemingly perverse," held that none of this Court's precedents supported such an analysis, and focused on the critical lack of an adjudication of a prior petition in holding that a previous petition dismissed for exhaustion does not make a later petition a "second or successive" one. As a matter of substantive law, Martinez-Villareal thus requires the Ninth Circuit to acknowledge the distinction between the effect of prior petitions dismissed without prejudice for exhaustion and those adjudicated on the merits -- a distinction that was disregarded both in the ruling below, and in Farmer.

By focusing on the ultimate merits of the Martinez-Villareal issue, the state's opposition ignores the context of Mr. Slack's request for a GVR, which is the denial of a certificate of probable cause for appeal. The question before this court is whether the Ninth Circuit, if given the opportunity to reconsider this case in light of the intervening decision in Martinez-Villareal, would consider the issue sufficiently "debatable" to justify the issuance of a certificate of probable cause, and thus to allow Mr. Slack simply the opportunity to argue that point to the court of appeals. That is all Mr. Slack seeks by asking this court for a GVR; and the state's failure to address this point should be taken as a concession that a GVR should be granted to allow the merits of this point to be litigated in the court of appeals in the first instance. Accordingly, it is imperative that this Court grant the petition, vacate the decision below, and remand for further proceedings. The Ninth Circuit can then decide the issue after consideration of this Court's decision in Martinez-Villareal, as well as full briefing and oral argument.

III.

IF IT DOES NOT SUMMARILY REMAND THIS MATTER TO THE COURT OF APPEALS, THIS COURT SHOULD GRANT PLENARY REVIEW TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE UNITED STATES COURTS OF APPEALS REGARDING WHETHER THE PROVISIONS OF RULE 9(B) GOVERNING "SECOND OR SUCCESSIVE" PETITIONS MAY BE PROPERLY INVOKED PRIOR TO THE COMPLETION OF THE "FIRST FULL ROUND" OF HABEAS CORPUS PROCEEDINGS

Mr. Slack also established in his certiorari petition why this Court should grant plenary review to address whether the provisions of Rule 9(b) may properly be invoked prior to the completion of the "first full round" of federal habeas corpus proceedings, if it declines to remand the case for reconsideration in light of Martinez-Villareal. As Mr. Slack explained in his petition, numerous decisions hold that a "second or successive" petition does not include one filed after a previous petition is dismissed for lack of complete exhaustion, but not a single decision agrees with the rulings in Farmer and here, which both hold that a "second or successive petition" under Rule 9(b) may include a petition filed after an earlier petition had been dismissed without prejudice due to lack of complete exhaustion. That split of authority, Mr. Slack asserted, warranted this Court's corrective intervention. See Supreme Court Rule 10(a).

In its opposition, the State acknowledges, as it must, that the type of circuit split described by Mr. Slack in his petition provides a proper basis for a grant of certiorari under Supreme Court Rule 10(a). The State also does not dispute -- because it cannot -- that, in pre-AEDPA cases, the Fifth, Seventh and Eighth Circuits have construed the term "second or successive" in a way that does not count earlier petitions that were dismissed for lack of exhaustion. E.g., Dellenbach v. Hanks, 76 F.3d 820, 822 (7th Cir. 1996) (per Posner, C.J.); Woods v. Whitley, 933 F.3d 321, 322 (5th Cir. 1991) (same); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir. 1990). Similarly, the State cannot and

does not dispute that all of the circuits (including the Ninth) that have considered the meaning of the term "second or successive" petition under the AEDPA have likewise concluded that a petition filed after an earlier petition had been dismissed for lack of complete exhaustion is not a "second or successive" petition. [3] The State, moreover, cannot cite a single decision that agrees with the Farmer rule applied by the courts below.

Despite this abundance of authority from other federal courts of appeals construing the term "second or successive" differently than the Ninth Circuit did here, the State nonetheless insists that "there is no split of authority," Opp. at 9, because "not one of the cases [cited by Mr. Slack] is on

[3] E.g., In re Wilson, 142 F.3d 939, 940 (6th Cir. 1998) ("this court joined every other court to consider the question and held that a habeas petition filed after a previous petition was dismissed without prejudice for failure to exhaust state court remedies is not a 'second or successive' petition"); McWilliams v. State of Colorado, 121 F.3d 573, 575 (10th Cir. 1997) ("[w]e instead accept the view espoused by every circuit that has considered this issue since enactment of the Antiterrorism and Effective Death Penalty Act: a habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of § 2244(b)(1).") (citations omitted); In re Gasery, 116 F.3d 1051, 1052 (5th Cir. 1997) (agreeing with "the First, Second, Seventh, and Ninth Circuits," and holding, that a habeas petition filed after dismissal without prejudice for failure to exhaust is not a "second or successive" petition); Christy v. Horn, 115 F.3d 201,208 (3d Cir. 1997) ("We hold that when a prior petition has been dismissed without prejudice for failure to exhaust state remedies ... the petitioner may file his petition in the district court as if it were the first such filing."); Benton v. Washington, 106 F.3d 162, 164 (7th Cir. 1996) (rejecting definition of "second or successive" petition that would include prior petitions dismissed for failure to exhaust and stressing that "[t]he sequence of filing, dismissal, exhaustion in state court, and refiling in federal court might generate multiple docket numbers, but it would not be right to characterize it as successive collateral attacks. The prisoner launched a single campaign; that skirmishes were spread across several years and two forums would not make it apt to call any of the steps a 'successive' collateral attack."); In re Turner, 101 F.3d 1323 (9th Cir. 1997) ("We hold that section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies"); Dickinson v. Maine, 101 F.3d 791 (1st Cir. 1996) (holding that petition, filed after first petition was dismissed for failure to exhaust, is not a "second or successive" one); Camarano v. Irvin, 98 F.3d 44, 46 (2d Cir. 1996) ("When a petition is dismissed without prejudice for failure to exhaust, there is no federal adjudication on the merits. To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether.").

point with this case," and because some of the cases cited by Mr. Slack involve the construction of the term "second or successive" as used in 28 U.S.C. § 2244, and not Rule 9(b). Opp. at 8-10. The State's arguments again lack merit.

First, the State's attempt to distinguish the pre-Act cases is nonsense. Although the State talks about various factual distinctions between this case and the opinions from other circuits, absent from the State's discussion is any mention of how this case -- in which the Ninth Circuit held that the mere existence of a previous habeas corpus petition, which was unadjudicated and dismissed without prejudice for lack of exhaustion, meant that a later petition was "second or successive" under Rule 9(b) -- can be meaningfully distinguished from Dellenbach, Hill and Woods. There simply is none. Judge Posner's opinion in Dellenbach, for example, holds that under the former 28 U.S.C. § 2244 (the statutory basis for Rule 9(b)), the filing of a third habeas corpus petition, after the dismissal of earlier petitions for lack of exhaustion, "was not an abuse of the writ" because "it is not an abuse of the writ to file a successive petition if the previous petitions were not denied on the merits." Dellenbach, 76 F.3d at 822. Hill likewise holds that a district court, in a pre-Act case, may properly apply the rules governing during the first round of federal habeas corpus to a second petition "because there had been no final determination on the merits of Hill's first petition." Hill, 894 F.2d at 1010.[4] And, the Fifth Circuit's decision in Woods, 933 F.2d at 322 squarely holds that, under McCleskey and Rule 9(b), abuse of the writ analysis applies only after a previous dismissal occurs "on the merits." All of these decisions, therefore, are directly contrary to the ruling below.

[4] The State's attempt to distinguish Hill – and all of the 28 U.S.C. § 2244 decisions – on the ground that "abuse of the writ is not mentioned anywhere in the Eighth Circuit's opinion," Opp. at 9, is completely illogical and clearly misguided. The Hill court found, as has every other court, that a petition filed after a previous dismissal for lack of exhaustion, is not "second or successive." Given this ruling, there was no need to address the issue of "abuse" and it does not appear in any of the opinions.

Second, the State once again argues that the numerous contrary interpretations of "second or successive" in post-AEDPA cases are irrelevant because "AEDPA does not apply to Mr. Slack's case." Opp. at 10. Once again, however, the State fails to acknowledge the reality that terms that have acquired a legal meaning are always construed to mean the same thing in the absence of compelling evidence to the contrary. E.g., Bradley, 410 U.S. at 609. The State likewise fails to acknowledge that several courts of appeals, including the Ninth Circuit, have already held that the AEDPA incorporates some of the concepts of abuse of the writ, including the term "second or successive," from pre-Act case law.[5] Because a substantial body of case law exists for the proposition that the term "second or successive" means the same thing under Rule 9(b) and 28 U.S.C. § 2244(b), AEDPA cases adopting a construction of that same term are relevant to the question of whether the Ninth Circuit's ruling here and in Farmer create a substantial split on this important issue.[6] More importantly, because all of these cases make clear that such a split does in

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[5] In Re Gasery, 116 F.3d at 1052; ("Although the AEDPA's amendment to § 2244 imposes stricter requirements for 'second or successive' petitions than the pre-AEDPA 'abuse of the writ' standard in Rule 9(b), nothing in the AEDPA affects the determination of what constitutes a 'second or successive' petition. Benton, 106 F.3d at 164 ("The 1996 legislation jettisons the concept of abuse of the writ in favor of more restrictive standards; it preserves the concept of the 'second or successive' petition. These words therefore retain the same meaning they had under Rule 9(b)."); Calderon v. United States District Court (Kelly), __ F.3d __, 1998 WL 848032 *9 (December 8, 1998) ("abuse of the writ evolved as a judicial created equitable doctrine, but is now codified by the AEDPA.").

[6] Even if the State were correct that the Ninth Circuit's rulings here and in Farmer intentionally rest on the unspoken premise that the pre-Act definition of "second or successive" radically differs from the post-Act definition contained in Martinez-Villareal, then the lower court rulings have diverged from the courts of appeals decisions in Gasery, Benton, and Kelly, which all hold that the AEDPA did not change the meaning of basic "abuse of the writ" concepts such as "second or successive" petition. Thus, even assuming *arguendo* that the Ninth Circuit here and in Farmer has intentionally taken the position that "second or successive" petition means something entirely different under Rule 9(b) than it does under 28 U.S.C. § 2244, a split of authority exists on that issue, which also warrants this Court's corrective intervention under (continued...)

fact exist, if this Court does not summarily grant, vacate and remand, it should grant plenary review to address and resolve that split.

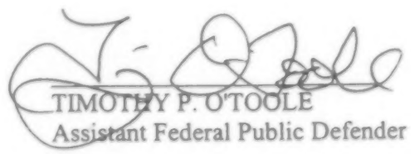
IV.

CONCLUSION

The State's opposition fails to provide a single credible reason that would support the denial of Mr. Slack's petition. The Ninth Circuit's summary determination that Mr. Slack's petition was "second or successive," and its summary application of the severe default rules of McCleskey before completion of the first round of habeas review, ran afoul of the intervening authority in Martinez-Villareal, as well as every other published opinion on the subject. The most efficient way to resolve this problem is to grant the petition, vacate the judgment and remand to the Court of Appeals for reconsideration in light of Martinez-Villareal. In the alternative, this Court should grant plenary review to resolve the split of authority created by the unprecedented decisions below.

Dated this 16th day of December, 1998.

Respectfully submitted,



TIMOTHY P. O'TOOLE
Assistant Federal Public Defender

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[6](...continued)
Supreme Court Rule 10(a).

CERTIFICATE OF SERVICE

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN ELY (NEVADA) and FRANKIE SUE DEL PAPA ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on December 16, 1998, she served a copy of the attached REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI by personally placing a copy in the United States Mail, postage paid to the addressee named below:

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO TONTON SLACK, Appellant, vs. THE STATE OF NEVADA, Respondent.	))))))))	No. 21421

ORDER DISMISSING APPEAL

(Filed Nov. 5 1991)

This is an appeal from a judgment of conviction of second-degree murder with the use of a deadly weapon. Having reviewed the record and briefs and having heard the parties' arguments, we conclude that Slack was properly convicted. On direct examination, Slack denied that he had a girlfriend/boyfriend relationship with the twelve-year-old victim. The prosecution's reference to a sexual relationship between Slack and the victim was not improper.

The prosecution, on cross-examination, asked Slack whether he had told the North Las Vegas Police Department that he had had sexual intercourse with the victim on Halloween, 1989. Slack did not remember making any such statement. Slack contends that this reference to an intimate relationship was improperly admitted because the jury was prejudiced by the thought of a nineteen-year-old man and a twelve-year-old girl having a sexual relationship.

We conclude that the prosecution's reference to the intimate relationship of Slack and the victim was properly admitted as evidence of Slack's credibility after he denied having a boyfriend/girlfriend relationship with the victim. The trial court has discretion over the limitations of cross-examination, Dyer v. State, 99 Nev. 422, 425, 663 P.2d 699, 701 (1983), and that discretion was not abused here.

Furthermore, any error in allowing this line of cross-examination was harmless, considering the amount of evidence linking Slack to the shooting. The fact that the jury returned a verdict of second-degree murder, when it was also instructed on first-degree murder, indicates that the disputed evidence was not prejudicial.

At oral argument, Slack's counsel conceded that the other issues raised in the brief were clearly without merit.

Accordingly, we hereby

ORDER this appeal dismissed.

/s/ Mowbray, C.J.
Mowbray

/s/ Springer, J.
Springer

/s/ Rose, J.
Rose

/s/ Steffen, J.
Steffen

/s/ Young, J.
Young

cc: Hon. Jack Lehman, Chief Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex Bell, District Attorney
Morgan D. Harris, Public Defender
Loretta Bowman, Clerk

ANTONIO T. SLACK
Name

31395
Prison Number

ELY STATE PRISON
Place of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK, (Full Name) Petitioner vs. DIRECTOR, NEVADA DEPARTMENT OF PRISONS, Respondent (Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.) and The Attorney General of the State of NEVADA, Additional Respondent. (**NOTE**: If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment of conviction was entered.)	CV-N----91-561-H CASE NO. ____ (To be supplied by the Clerk) PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT to 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY

1) Name and location of the court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT CLARK COUNTY, LAS VEGAS, NEVADA

2) Date judgment of conviction was entered: MAY 1990

3) Case number: C92060.

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5-YEARS-TO-LIFE SENTENCES

   a) In a capital case where death penalty has been imposed, date of scheduled execution NOT APPLICABLE

5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

   Yes [ ] No [XXX]

6) Nature of the offense involved: (all counts) SECOND DEGREE MURDER WITH USE OF DEADLY WEAPON

7) What was your plea? (check one)

   a) Not Guilty [XXX] b) Guilty [ ]
   c) Nolo Contendere [ ]

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: NOT APPLICABLE

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

   a) A jury [XXX]
   b) A judge without a jury [ ]

10) Did you testify at trial (if any)?
    Yes [XXXX] No [XXXX]

11) Did you appeal from the judgment of conviction? Yes [XXX] No [ ]

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NEVADA SUPREME COURT NO. 21421 DISMISSED APPROX. OCT/NOV PETITIONER DOES NOT POSSESS FINAL ORDER AT THIS TIME

13) If you did not appeal, explain briefly why you did not: DID APPEAL / NOT APPLICABLE

a) Did you seek permission to file a late appeal? Yes [ ] No [XXX] WASN'T NECESSARY

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT THE DEFENDANT WITH SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

INCIDENT INVOLVED ACCIDENTAL SHOOTING, TESTIMONY SUPPORTS SAME, CONVICTION ON SECOND DEGREE MURDER IS WITHOUT ESSENTIAL ELEMENTS OF OFFENSE FOR SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON, INTENT AND POSSESSION OF WEAPON LACKING FACTUAL EVIDENCE OR TESTIMONY. ALSO *SEE* PETITIONER'S OPENING BRIEF FROM STATE COURT DIRECT APPEAL ON THIS CLAIM WHICH WAS *CONSTITUTIONALLY RAISED ON BASIS OF JACKSON V. VIRGINIA*, 443 U.S. 307 (1979).

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [XXX] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [ ] No [XXXXX]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,
Yes [ ] No. [ ],
N/A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSUE.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSUE

B)(1) Ground Two: THE TRIAL COURT IMPROPERLY ALLOWED PREJUDICIAL EVIDENCE OF A SEXUAL RELATIONSHIP BETWEEN THE DEFENDANT AND THE TWELVE YEAR OLD VICTIM.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

EVIDENCE OF PRIOR BAD ACTS AND UNCHARGED MISCONDUCT VIOLATED DEFENDANT'S RIGHT to A FAIR TRIAL *UNDER FOURTEENTH AMENDMENT*

AS FURTHER ARGUED IN THE DIRECT APPEAL, *SEE ALSO* DEFENDANT'S OPENING BRIEF IN STATE DIRECT APPEAL.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [XXX] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did that: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [ ] No [XXX]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,
Yes [ ] No [ ], NA

and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT RULED ON ISSUE EXHAUSTING REMEDIES

C)(1) Ground Three: THE REASONABLE DOUBT INSTRUCTION TO JURY BY TRIAL COURT VIOLATED DUE PROCESS CLAUSE OF U.S. AND STATE CONSTITUTION (CAGE VS LOUISIANA) GROUND FOUR: TRIAL COURT ERRED BY NOT ADEQUATELY DEFINING PREMEDITATION IN JURY INSTRUCTIONS REGARDING MURDER.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

GROUND THREE: REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS CLAUSE OF BOTH THE U.S. AND NEVADA CONSTITUTIONS, *SEE CAGE V. LOUISIANA*, 111 S. Ct. 328 (1990).

GROUND FOUR: TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS AS SHOWN IN DEFENDANT'S STATE COURT SUPREME

COURT DIRECT APPEAL OPENING BRIEF (UNITED STATES V. GILBREATH, 452 F. 2d 992, 5th CIR. 1971), BY FAILING TO ADEQUATELY DEFINE "PREMEDITATION" IN JURY INSTRUCTION.

(3) Statement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [XXXX] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [ ] No [XXXX]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,
Yes [ ] No [ ],
N/A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes [XXXXX] No [ ]

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them: NOT APPLICABLE

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack?
Yes [ ] No [XXXXX]

If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: NOT APPLICABLE

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack?

Yes [XXXX] No [ ].

If "Yes", state the name of the court and the nature of the proceeding: NOT APPLICABLE

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction?

Yes [XXXXXX] No [ ].

If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you were so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: FROM ARRAIGNMENT THRU TRIAL = MICHAEL GARDNER DEPUTY CLARK COUNTY PD ON DIRECT APPEAL = SAME COUNSEL ABOVE (MICHAEL GARDNER, DEP.P.D.)

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

REQUESTED 18 USC E ✓Antonio T. Slack
Signature of Petitioner

3006A-g

Signature of Attorney (if any)

(Attorney's full address and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. § 1746. 18 U.S.C. § 1621.

Executed at ELY, NEVADA on
(Location)

NOVEMBER 12, , 1991
(Date)

✓Antonio T. Slack
(Signature)

ANTONIO TONTON SLACK
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Petitioner In Pro Se

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO TONTON SLACK,	Case No. CV-N-91-561-HDM
Petitioner,	MOTION TO STAY THESE HABEAS PROCEEDINGS
DIRECTOR, NDOP, et al.,	
Respondents.	

_____/

COMES NOW, petitioner, ANTONIO T. SLACK, in pro se and with the assistance of an inmate law clerk, MICHAEL R. EVANS #26022, to respectfully move this Honorable Court for an order staying these habeas proceedings until this petitioner has exhausted the following issues in a state court proceeding, pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982) and *Harris v. Reed*, 109 S.Ct. 1038 (1989):

1) Ineffective assistance of counsel during all pretrial and trial proceedings as follows:

a) Failure to raise a Franklin violation, in that the deal made with petitioner's co-defendant was not completed before his testimony was allowed;

b) That counsel failed to offer and/or request an accomplice and/or informant instruction.

2) That the trial court erred in not instructing the jury on an accomplice instruction and his testimony.

3) That the trial court erred in allowing the petitioner's co-defendant to testify prior to the deal being made with him and the state being completed.

4) That there was prosecutorial misconduct, in that the prosecution withheld from the jury the fact that the only finger prints found on the murder weapon were those of the co-defendant's.

Petitioner respectfully request one (1) year to litigate these issues in a state court proceeding so that he may present these issues with the issues that he has already presented in his filed habeas.

Dated this 31st day of January, 1992.

respectfully submitted by,

/s/ Antonio Tonton Slack
ANTONIO TONTON SLACK

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 31 day of January, 1992, that I placed a true and correct copy of the foregoing motion in the United States mail, postage prepaid, addressed as follows: Frankie Sue Del Papa, Nevada Attorney General, Capitol Complex, Carson City, Nevada 89710.

/s/ Antonio Tonton Slack
ANTONIO TONTON SLACK
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Petitioner In Pro Se

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO TONTON SLACK,

Petitioner,

vs.

DIRECTOR, NDOP, et al.,

Respondents.

_____/

Case No. CV-N-91-561-HDM

PURPOSED [sic] ORDER

After reading the petitioner's motion to stay these habeas proceedings and good cause appearing.

IT IS HEREBY ORDERED that these proceedings are stayed for a period of one (1) year or until the parties notify this court otherwise.

IT IS SO ORDERED.

Dated this ___ day of _____, 1992.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ANTONIO TONTON SLACK,
Plaintiff(s),
vs.
DIRECTOR, NEVADA DEPARTMENT OF PRISONS, et al.,
Defendant(s).

CV-N-91-561-HDM

MINUTES OF THE COURT

February 19, 1992

PRESENT: HONORABLE HOWARD D. McKIBBEN, U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart

Reporter/Recorder: Donna Casey

Counsel for Plaintiff(s): Antonio Tonton Slack, in Pro Se

Counsel for Defendant(s): Kevin G. Higgins

PROCEEDINGS: Telephonic Hearing on Petitioner's Motion to Stay Habeas Proceedings (#5)

9:10 a.m. Court convenes.

Court and counsel confer.

There being no objection by either party,

IT IS ORDERED that this action is *dismissed* without prejudice. Petitioner is granted leave to file an application to renew upon exhaustion of all State remedies.

9:15 a.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By: /s/ Bill Stewart
Deputy Clerk

CASE NO. ~~89 090260 C~~ 92060

DEPT. NO. 4

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE
COUNTY OF CLARK

* * *

ANTONIO SLACK, Appellant, vs STATE OF NEVADA, Respondent.	REQUEST FOR APPOINTMENT OF AN ATTORNEY (Filed Feb. 1, 1993)

COMES NOW, ANTONIO SLACK, in proper person, with this request that an attorney be appointed to represent him. This request is made pursuant to NRS 171.188 whereas an indigent person can have an attorney appointed to represent him.

The above named Appellant swears under penalty of purjury [sic] that he is without means of employing an attorney.

Dated this 26 day of January, 1993.

/s/ Antonio Slack
ANTONIO SLACK

in proper person

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ANTONIO TONTON SLACK, #0926733 Defendant,	)	CASE NO. C92060 DEPT. NO. IV DOCKET NO. C

ORDER

DENYING PROPER PERSON PETITION FOR

POST-CONVICTION RELIEF

DATE OF HEARING: 9-2-92
TIME OF HEARING: 9:00 A.M.

The Proper Person Petition for Post-Conviction Relief of Antonio Tonton Slack having come before the above entitled Court on the 2nd day of September, 1992, this Court having duly considered the Proper Person Petition for Post-Conviction Relief and Respondent's Answer in

Opposition to the Petition for Post-Conviction Relief and good cause appearing the Court does hereby enter the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

1. The trial of this matter occurred between February 20 and February 22, 1990 in Department IV of the Eighth Judicial District Court. The trial jury returned a verdict of guilty of Murder of the Second Degree With Use of a Deadly Weapon. Thereafter, the court imposed consecutive sentences of life with the possibility of parole in the Nevada State Prison. Additionally, the Court stipulated that Slack should pay $2,413.50 in restitution.

2. A direct appeal was pursued to the Nevada Supreme Court and by its Order Dismissing Appeal filed November 5, 1991 the conviction and sentence of Slack were affirmed.

3. Defendant Slack did cause to be filed on July 10, 1992 a Proper Person Petition for Post-Conviction Relief wherein he alleged that he had received ineffective representation of counsel at the trial and appellate levels and that the Court had committed judicial error during his trial proceedings. The Court does expressly find that all of the allegations raised by the Defendant are contradicted by the record in this case. Slack was represented by Michael Gardner of the Clark County Public Defender's Office at the trial and appellate levels. The Court finds that his representation was effective, professional, vigorous and thorough. The petition of Slack has failed to establish that the representation of Michael

Gardner was deficient or that Slack was prejudiced by the manner in which he was defended by counsel.

4. Slack has complained in his petition that his trial counsel failed to determine what type of agreement was reached with Kamal Bey, who was a principal State's witness. The Court finds that this contention is totally specious. The preliminary hearing and the trial record explicitly established the nature of the agreement between Bey and law enforcement. In return for Bey's cooperation as a witness the State of Nevada agreed to withdraw its motion to have Kamal Bey certified to stand trial as an adult. However, the substantive charge of accessory to murder in the juvenile system was not affected by the agreement. Subsequently, Bey was committed to Elko for six months as a result of the finding in Juvenile Court regarding the accessory to commit murder offense. Accordingly, this Court finds that Defendant Slack and his attorney were completely aware of the parameters of the agreement reached between Kamal Bey and the prosecution. Further, this Court finds that trial counsel was not ineffective in failing to file a pre-trial motion in limine to exclude the testimony of Kamal Bey. Nothing about the status of Kamal Bey made him incompetent to be a prosecution witness. Effective trial representation does not require the filing of frivolous pre-trial motions. Slack argues that his trial counsel failed to interview Slack's brother to refute the testimony of Kamal Bey. However, the testimony of a family member would have been inherently suspect and of questionable credibility in the eyes of the jury. Also, this contention is a naked allegation unsupported by any factual predicate. Slack contends that his counsel was ineffective in failing to file

a pre-trial motion in limine to exclude reference to prior sexual relations with the victim. This contention is frivolous. In its Order Dismissing Appeal filed November 5, 1991 the Nevada Supreme Court ruled that the prosecution's reference to the intimate relationship between Slack and the victim was properly admitted as evidence of Slack's credibility after he denied having a boyfriend/girlfriend association with the victim. Hence, this issue has already been addressed by the State Supreme Court and the Court finds that their previous ruling remains the law of this case. Slack submits that his counsel was ineffective in not requesting an accomplice instruction. This Court finds no evidence that Kamal Bey was an accomplice to murder. Consequently, the Court would not have given an accomplice instruction had one been proffered by trial counsel for Defendant Slack. Slack also argues that he was prejudiced by the failure of his counsel to present evidence to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey. This assertion is a naked allegation unsupported by the record. Furthermore, Defendant Slack made various admissions to citizens and to representatives of the North Las Vegas Police Department accepting responsibility for the shooting of Alanna Holmes. Accordingly, the Court finds that the totality of the evidence introduced at the trial was overwhelming proof that Slack was the shooter of Alanna Holmes.

5. Slack also argues that he received ineffective representation during his direct appeal. The Court finds that this contention is without merit. Slack contends that a Franklin violation should have been raised on direct appeal. However, there is no evidence that Kamal Bey

was an accomplice in the shooting of the victim. The only evidence involved Kamal Bey as an accessory to the murder of Alanna Holmes. The Franklin rule applies to accomplice testimony. Therefore, the Court finds that the Franklin issue was not applicable to this case. Likewise, since there is no evidence that Bey was an accomplice it was not incumbent upon appellate counsel to argue before the State Supreme Court that an accomplice instruction should have been given to the trial jury. Additionally, this Court finds no evidence of prosecutorial misconduct in the record of the trial proceedings. So, the failure of appellate counsel to raise the issue of prosecutorial misconduct does not establish ineffective representation.

6. The Court also rejects all arguments by Slack that judicial error occurred at his trial. This Court finds that the trial court properly instructed the trial jury. Instructions regarding accomplice testimony were not applicable in that no accomplice testified. The issue regarding premeditation is now academic. The trial jury convicted Slack of Murder of the Second Degree With Use of a Deadly Weapon and not murder of the first degree.

CONCLUSIONS OF LAW

1. Slack's claim of ineffective assistance of counsel must be analyzed under the "reasonably effective assistance" standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Nevada Supreme Court in *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985). The *Strickland* standard requires a two-prong analysis. First, a defendant

must show that his counsel's performance was deficient. This analysis requires a showing that counsel made errors so serious that a defendant's attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced his defense and caused him to be deprived of his right to a fair trial. See also *Bejarano v. State*, 106 Nev. 840, 842, 801 P.2d 1388 (1990). This Court concludes as a matter of law that Defendant Slack has failed to establish that his trial and appellate counsel provided ineffective representation and Slack has failed to show that he suffered any prejudice by the manner in which he was represented at the trial and appellate levels. Additionally, Defendant may not litigate in a petition for post-conviction relief matters which have been decided on his direct appeal. *Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975); *Walker v. State*, 85 Nev. 337, 343, 455 P.2d 34 (1969) and *State v. Loveless*, 62 Nev. 312, 150 P.2d 1015 (1944).

2. Further, the Court concludes that Slack's proper person petition consists entirely of factual claims which are belied or repelled by the record of these proceedings. A defendant seeking post-conviction relief is not entitled to an evidentiary hearing or to any of the remedies he seeks based upon factual allegations which are contradicted by the record. See *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984) and *Grondin v. State*, 97 Nev. 454, 634 P.2d 456 (1981).

DECISION

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is the Order of this Court that Defendant Slack's Proper Person Petition for Post-Conviction Relief is hereby denied.

DATED this 11th day of February, 1993.

/s/ Gerard J. Boneauanni
DISTRICT JUDGE

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799

BY /s/ Melvin T. Harmon
MELVIN T. HARMON
Chief Deputy District Attorney
Nevada Bar #000862

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO TONTON SLACK, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 25088

ORDER DISMISSING APPEAL

(Filed Dec. 30, 1993)

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

On May 23, 1990, the district court convicted appellant of one count of second degree murder with use of a deadly weapon. The district court sentenced appellant to serve in the Nevada State Prison two consecutive terms of life with the possibility of parole. This court dismissed appellant's direct appeal. Slack v. State, Docket No. 21421 (Order Dismissing Appeal, November 5, 1991).

On July 10, 1992, appellant filed in the district court a petition for post-conviction relief. In his petition, appellant argued that he was denied his right to effective assistance of counsel at trial and that he was denied his right to effective assistance of counsel on direct appeal. Appellant further argued that the district court erred by failing to instruct the jury on the credibility of accomplice testimony and premeditation. Specifically, appellant stated the following about his trial attorney: 1) he failed

to find out what type of agreement was made with Kamal Bey, the state's key witness and appellant's co-defendant; 2) he failed to file a motion in limine to prohibit the introduction of evidence concerning prior sexual relations with the victim; 3) he failed to file a motion in limine to prohibit the testimony of Kamal Bey because Bey's agreement with the state required specific testimony by Bey; 4) he failed to interview appellant's brother even though the brother's testimony would have rebutted Bey's testimony; 5) he failed to examine Bey about Bey's agreement with the state; 6) he failed to request an accomplice instruction; and 7) he failed to introduce evidence concerning fingerprints belonging to Bey which were found on the murder weapon. Further, appellant stated the following about his appellate attorney: 1) he failed to raise as an issue on appeal a *Franklin* violation which occurred during trial; 2) he failed to raise the issue that appellant's trial counsel failed to request an accomplice instruction; 3) he failed to raise the issue that Kamal Bey was a co-defendant and thus Bey's testimony was questionable; and 4) he failed to raise the issue that there was prosecutorial misconduct in that the prosecutor failed to inform the jury that Bey was a co-defendant and that Bey's fingerprints were the only fingerprints found on the murder weapon.

The state opposed appellant's petition. In its opposition, the state claimed that appellant's allegations are repelled by the record. On February 11, 1993, the district court, without appointing counsel or conducting an evidentiary hearing, denied appellant's petition for post-conviction relief. The district court concluded that appellant's allegations are belied or repelled by the record and

that appellant was not entitled to an evidentiary hearing on his claims. This appeal followed.

When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Our review of the record on appeal and specifically our review of the transcript of appellant's trial, reveals that appellant's claims are repelled by the record. The terms of the state's agreement with Bey were fully disclosed to the jury. At trial, appellant's theory of the case was that he accidentally shot the victim. Appellant testified that his finger was on the trigger when the gun fired. It is therefore irrelevant that Bey's fingerprints were found on the weapon. Bey was neither an accomplice nor a co-defendant. Appellant was not prejudiced by the lack of an accomplice testimony instruction. Appellant's remaining claims are similarly repelled by the record. The district court properly denied appellant's petition for post-conviction relief.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant cannot demonstrate error in this appeal, and that briefing and oral argument are unwarranted. *See* Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), *cert. denied*, 423 U.S. 1077 (1976). Accordingly, we

ORDER this appeal dismissed.

/s/ Rose, C.J.
Rose

/s/ Steffen, J.
Steffen

/s/ Young, J.
Young

/s/ Springer, J.
Springer

/s/ Shearing, J.
Shearing

cc: Hon. Gerard J. Bongiovanni, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex A. Bell, District Attorney
Antonio Tonton Slack
Loretta Bowman, Clerk

Antonio T. Slack
Name

31395
Prison Number

Ely State Prison
Place of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK,
(Full Name)
Petitioner

vs.

S.K. McDANIEL,
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.)
Respondent.

and

The Attorney General of the State of NEVADA,
Additional Respondent.

NOTE: if petitioner is attacking a judgement which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgement of conviction was entered.)

CV-N-95-00194-DWH (N/A)

Petition For A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY

(Filed May 30, 1995)

1) Name and location of the court which entered the judgement of conviction under attack: THE 8TH JUDICIAL DISTRICT COURT LAS VEGAS NEVADA

2) Date judgement of conviction was entered: MAY 22, 1990

3) Case Number: C-92060

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5 YEARS TO LIFE TERMS

   a) In a capital case where death penalty has been imposed, date of scheduled execution N/A

5) Are you pesently [sic] serving a sentence imposed for a conviction other than the conviction under attack in this motion?

   Yes [ ] No [XX]

6) Nature of the offense involved: (all counts) SECOND DEGREE MURDER WITH THE USE OF DEADLY WEAPON

7) What was your plea? (check one)

   a) Not Guilty [XX] b) Guilty [ ]
   c) Nolo Contendere [ ]

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: _____

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

   a) A jury [XX]
   b) A judge without a jury [ ]

10) Did you testify at trial (if any)?
    Yes [XX] No [ ]

11) Did you appeal from the judgement of conviction?
    Yes [XX] No [ ]

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): THE SUPREME COURT OF NEVADA CARSON CITY, NV. DISMISSED ON NOV. 05, 1991 CASE NO. 21421

13) If you did not appeal, explain briefly why you did not: _____

   a) Did you seek permission to file a late appeal?
   Yes [ ] No [ ]

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: PETITIONER WAS DENIED HIS 6th ADMENDMENT [SIC] RIGHT TO AN EFFECTIVE ASSISTANCE OF COUNSEL AT PRE-TRIAL & TRIAL; PETITIONER DENIED HIS 6th AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

(2) Supporting Facts: (Without citing legal authority or arguments state briefly the facts which support your claim.)

SEE ATTACHED PAGE 3A-3B

SLACK V. STATE

CASE NO. CV-N-00194-DWH (N/A)

POST-CONVICTION PETITION WRIT OF
HABEAS CORPUS
GROUN [SIC] ONE SUPPORTING FACTS:

PETITIONER'S COUNSEL OF RECORD FAILED TO CONDUCT PROPER PRE-TRAIL [SIC] AND TRIAL PROCEEDINGS IN THE FOLLOWING MANNERS:

1) FAILED TO FIND OUT WHAT KIND OF DEAL KAMAL BEY, MADE WITH THE STATE FOR HIS TESTIMONY. 2) FAILED TO FILE A PRE-TRAI [SIC] MOTION IN LIMINE TO STOP THE INTRODUCTION OF PRIOR SEXUAL RELATIONS WITH THE VICTIM. 3) FAILED TO FILE A PRE-TRIAL MOTION IN LIMINE TO STOP THE TESTIMONY OF KAMAL BEY, ILLEGIBLE HIS DEAL WITH THE STATE WAS BASED TOTALLY ON HIS TRIAL TESTIMONY, IN THAT THE DEAL WASN'T COMPLETED. 4) FAILED TO INTERVIEW DEFENDANT'S BROTHER TO REFUTE THE TESTIMONY OF KAMAL BEY. 5) TRIAL COUNSEL FAILED TO HAVE DISCLOSED WHAT DEAL WAS MADE WITH KAMAL BEY AND THE STATE. 6) COUNSEL FAILED TO REQUEST AN ACCOMPLICE INSTRUCTION. 7) COUNSEL FAILED TO HAVE IT DISCLOSED TO THE JURY THAT THE ONLY FINGERPRINTS FOUND ON THE MURDER WEAPON WERE NOT THE DEFENDENT'S AND WERE THOSE OF KAMAL BEY THE DEFENDANT'S CO-DEFENDANT. 8) COUNSEL FAILED TO PRESENT TO THE JURY THAT KAMAL BEY WAS A KNOWN GANG MEMBER. PETITIONER'S APPEAL

COUNSEL WAS INEFFECTIVE AND PREJUDICED THIS PETITIONER BY FAILING TO RAISE THE FOLLOWING ISSUES ON APPEAL:

1) APPELLATE COUNSEL FAILED TO RAISE A FRANKLIN ISSUE ON DIRECT APPEAL. 2) APPELLATE COUNSEL FAILED TO RAISE THAT TRIAL COUNSEL FAILED TO REQUEST AN ILLEGIBLE INSTRUCTION FROM THE TRIAL COURT. 3) APPELLATE COUNSEL FAILED TO RAISE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ON DIRECT APPEAL. 4) APPELLATE COUNSEL FAILED TO RAISE THE ISSUE THAT THERE WAS PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR FAILED TO INFORM THE JURY THAT KAMAL BEY WAS A SUSPECT AND ALSO CO-DEFENDANT. 5) APPELLATE COUNSEL FAILED TO RAISE THE ISSUE THAT KAMAL BEY'S TESTIMONY WASN'T TRUST WORTHY DUE TO THE FACT THAT KAMAL BEY WAS A CO-DEFENDANT.

COUNSEL'S FAILURE TO DO THE ABOVE PREJUDICED THIS PETITIONER AND DENIED HIM A FAIR AND IMPARTIAL TRAIL, [sic] AS WELL AS HIS 6th AND 14th AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL DURING ALL CRITICAL STAGES OF A CRIMINAL PROCEEDING AND DIRECT APPEAL.

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgement of conviction did you raise this issue?
Yes [ ] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?
Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: WRIT OF HABEAS CORPUS POST CONVICTION (PURSUANT TO 177.315 ET. SEQ. THE 8th JUDICIAL COURT DISTRICT OF CLARK COUNTY. DENIED 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition?
Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition?
Yes [XX] No [ ]

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,

Yes [ ] No [ ],

and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): IN THE SUPREME COURT OF THE STATE OF NEVADA CARSON CITY, NV. CASE NO. 25088 DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

B)(1) Ground Two: THE TRIAL COURT VIOLATED PETITIONER'S 6th AND 14th AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL TRIAL.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

THE TRIAL COURT DEPRIVED THE PETITIONE [SIC] OF HIS RIGHTS TO A FAIR AND IMPARTIAL TRIAL. WHEN THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON ACCOMPLICE'S TESTIMONY.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [ ] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not:

_____

Post-conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: WRIT OF HABEAS CORPUS (POST-CONVICTION PURSANT [SIC] TO 177.315 ET. SEQ), THE 8TH JUDICAL [SIC] DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK LAS VEGAS, NV. DENIED 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition?

Yes [XX] No [ ]

(g) If your answer to (f) is "yes", state whether this issue was raised in the appeal,

Yes [ ] No [ ],

and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): IN THE SUPREME COURT OF THE STATE OF NEVADA CARSON CITY, NEVADA. DISMISSED ON DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "no", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

c)(1) Ground Three: THERE WAS PROSECUTORIAL MISCONDUCT IN PETITIONER'S CASE THAT PREJUDICED PETITIONER

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

THE PROSECUTION WITHHELD FROM JURY THAT THE ONLY FINGERPRINTS FOUND ON THE MURDER WEAPON WERE KAMAL BEY, ALSO THAT HE WAS A CO-DEFENDANT IN THE CASE.

(3) Sttement [sic] of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [ ] No [XX]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: ATTORNEY OF RECORD DID NOT RAISE THIS ISSUE ON DIRECT APPEAL.

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the the [sic] court where the motion or petition was filed, the result and date of the court's decision: WRIT OF HABEAS CORPUS (POST-CONVICTION

PURSUANT TO 177.315 ET. SEQ.) THE 8th JUDICIAL COURT COUNT [sic] OF CLARK, NEV. 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition?

Yes [XX] No [ ]

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,

Yes [ ] No [ ]

and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): THE SUPREME COURT OF NEVADA CARSON CITY, NV DISMISSED DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes [XX] No [ ]

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them:

_____

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack?

Yes [XX] No [ ]

If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: U.S. DISTRICT COURT, DISTRICT OF NEVADA. 1) INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT; 2) TRIAL COURT IMPROPERLY ALLOWED PREJUDIAL [SIC] EVIDENCE OF PRIOR SEXUAL RELATIONS; 3) THE REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS; 4) PREMEDITATION WAS IMPROPERLY DEFINED TO JURY. PETITION FOR WRIT OF HABEAS CORPUS, PURSANT [SIC] TO 28 U.S.C. 2254 DISMISSED WITHOUT PREJUDICE FEBRUARY 19, 1992.

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack?

Yes [XX] No [ ]

If "Yes", state the name of the court and the nature of the proceeding: UNITED STATES DISTRICT COURT; PETITION OF WRIT OF HABEAS CORPUS PURSANT [SIC] TO 28 U.S.C. 2254 CASE NO. CV-N-91-561-HDM.

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during

the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction?

Yes [XX] No [ ]

If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: R. MICHAEL GARDNER, DPD; TRIAL & APPEAL 309 S. THIRD STREET LAS VEGAS NV. 89155 VICTOR AUSTIN, DPD, ARRAIGNMENT AND PLEA 309 S. THIRD STREET LAS VEGAS, NV. 89155 R. MICHAEL GARDNER DPD, SENTENCING 309 S. THIRD STREET LAS VEGAS, NV. 89155 COUNSEL'S APPOINTED BY THE COURT.

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

/s/ Antonio T. Slack
Signature of Petitioner

Signature of Attorney
(if any)

Attorney's full address
and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. § 1746. 18 U.S.C. § 1621.

Executed at Ely State Prison (Location) on March 19, 1995 (Date)

/s/ Antonio T. Slack
(Signature)

ANTONIO T. SLACK #31395
P.O. BOX 1989
ELY, NEV. 89301

IN PER SE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, v DIRECTOR, NDOP, ET AL., Respondant.	Case No. CV-N-95-194-DWH MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW petitioner, Antonio T. Slack, proceeding in per se, with the assistance of an inmate law clerk, Illegible # Illegible, and hereby moves this court for its order appointing counsel in this Habeas Corpus Writ action.

This motion is made in good faith and based upon 28 U.S.C. Sec. 1915(D) and 18 U.S.C. Sec. 3006A(9) and is further made and based upon these pleadings and papers on file herein and affidavit.

DATED this ___ day of June, 1995.

Respectfully submitted,

/s/ Antonio T. Slack
ANTONIO T. SLACK #31395
P.O. Box 1989
Ely Nev. 89301

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, v DIRECTOR, NDOP, ET AL., Respondent.	CASE NO. CV-N-95-194-DWH AFFIDAVIT OF PETITIONER

I, ANTONIO T. SLACK, hereby swear under the penalty of perjury appear under oath and state that:

1) Petitioner is indigent and cannot afford to pay for an attorney to represent him in this matter.

2) Petitioner is illiterate and incompetent with the knowledge of litigating the law.

3) Petitioner has been receiving assistance from inmate law clerks assigned to NDOP's law libraries on his case.

4) Petitioner's case has merit and a good chance of sucess [sic] with the assistance of an attorney, for the Nevada Bar Association and American Bar Association.

DATED This ___ day of ___, 1995

/s/ _____
ANTONIO T. SLACK #31395

Respectfully Written and
Submitted,

/s/ Mr. Antonio T. Slack
ANTONIO T. SLACK 31395
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Written and signed on the ____ day of June 1995.

Certificate of Service

I, Antonio T. Slack, an Ely State Prisoner on the ____ day of June, 1995, have placed in the United States mail a true and correct copy of this letter addressed to the following:

Frankie Sue Del-Papa/ATTORNEY GENERAL
Heroes' Memorial Building
Capital Complex
Carson City, Nevada 89301

/s/ _____
Antonio T. Slack #31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

ANTONIO T. SLACK #31395
P.O. BOX 1989
ELY, NEV. 89301

IN PER SE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, v DIRECTOR, NDOP, ET AL., Respondant.	CASE NO. CV-N-95-194-DWH ORDER APPOINTING COUNSEL

PETITIONER, an Ely State Prisoner appearing in per se and in Forma Pauperis requesting appointment of counsel.

Good Cause Appearing.

IT IS THEREFORE, HEREBY ORDERED that counsel is appointed for petitioner.

DATED this ____ day of ____, 1995

/s/ _____
UNITED STATES DISTRICT
JUDGE

CERTIFICATE OF SERVICE

I, ANTONIO T. SLACK, an inmate at Ely State Prison on this ____ day of ____, 1995. I served a true copy of the foregoing MOTION FOR APPOINTMENT OF COUNSEL, ORDER AND AFFIDAVIT by placing a copy in the United States Postal mail to the following:

FRANKIE SUE DEL PAPA
ATTORNEY GENERAL
HEROES' MEMORIAL BUILDING
CAPITAL COMPLEX
CARSON CITY, NEVADA 89710

/s/ _____
ANTONIO T. SLACK #31395
ELY STATE PRISON
POST OFFICE BOX 1989
ELY NEVADA 89301

FRANKIE SUE DEL PAPA
Attorney General
ROBERT E. WIELAND
Deputy Attorney General
Criminal Justice Division
Capitol Complex
Heroes' Memorial Building
Carson City, Nevada 89710
Telephone: (702) 687-3529

Attorney for Respondents.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH **OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL**

Respondents, by an [sic] through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, oppose petitioner's motion for appointment of counsel.

This opposition is made and based on the attached points and authorities as well as all other pleadings, documents and exhibits on file in the above-entitled matter.

POINTS AND AUTHORITIES

Petitioner Antonio T. Slack (hereinafter SLACK) has filed a motion for counsel stating that he is illiterate. This

assertion is belied by the pleadings that Slack has already filed in this matter. Slack acknowledges that he is receiving the benefit of the services of inmate law clerks. He is entitled to nothing more. Whether his claims have merit or not is up to this Court to determine. Slack is not constitutionally entitled to counsel in this proceeding and he has advance no reason why he can not litigate the matter himself. Respondents respectfully suggest that this Court should not waste scarce judicial resources.

RESPECTFULLY SUBMITTED this 7th day of July, 1995.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Robert E. Wieland
Robert E. Wieland
Deputy Attorney General
Criminal Justice Division
(702) 687-3529

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 10th day of July, 1995, I served a copy of the foregoing OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL, by mailing a copy thereof to:

ANTONIO T. SLACK, #31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

/s/ Traci R. Dory

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs DIRECTOR, NDOP, et al., Respondents	)	Case No. CV-N-95-194-DWH
	)	ORDER
	)	(Filed Feb. 29, 1996)

Respondents have filed a motion to dismiss the petition in this action (#15). Petitioner has failed to oppose the motion. Petitioner is hereby instructed to file points and authorities in opposition to the motion or respondents' motion will be granted. *See* Local Rule 110-2.

Petitioner has also moved for appointment of counsel (#8), which at this time will be denied.

IT IS THEREFORE ORDERED that Petitioner shall have twenty (20) days from the date of this order within which to file points and authorities in opposition to the motion. After petitioner's said response to the motion is filed, respondents shall thereafter have fifteen (10) [sic] days within which to file a reply. If petitioner fails to respond to this order, the motion will be deemed consented to and granted.

IT IS FURTHER ORDERED that petitioner's motion for appointment of counsel (#8) is *DENIED*.

DATED this 29th day of February, 1996.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH MOTION FOR APPOINTMENT OF COUNSEL (Filed Dec. 31, 1996)

Petitioner ANTONIO T. SLACK, pursuant to U.S.C. Section 3006 A(g), requests this Court to appoint counsel to represent him in this habeas petition for the following reasons:

1) Petitioner is not able to afford counsel. *See:* Motion To Proceed *In Forma Pauperis*, on file herein;

2) The issues in this case are complex;

3) The issues involved in this case will require investigation which the Petitioner cannot do while confined in prison;

4) The prison limits the hours that the Petitioner may have access to the law library and the materials contained there are very limited;

5) Petitioner has a very limited knowledge of the law, and;

6) The ends of justice would best be served in this case if an attorney was appointed to represent the Petitioner.

Petitioner has contacted an attorney who is willing to accept an appointment to represent him in this matter.

See: (Attached) copy of letter from Joan D. Buckley, Esq. *Also see:* (Attached) affidavit of Petitioner. Ms. Buckley not only has expressed an interest in being appointed to represent Petitioner in this matter, but also possesses some knowledge of the issues herein.

THEREFORE, Petitioner respectfully requests this Honorable Court to appoint Ms. Buckley to represent him herein, or to appoint the Federal Public Defenders' Office should the Court be hesitant to name Ms. Buckley. *See:* (Attached) PROPOSED ORDER.

Dated Dec. 23, 1996

/s/ Antonio T. Slack
Antonio T. Slack
Ely State Prison
P. O. Box 1989
Ely, Nevada 89301

CERTIFICATE OF MAILING/SERVICE

I, Antonio T. Slack, hereby certify that on this date I served, by U.S. mail, a true and correct copy of this pleading with its attachments, to the following persons:

Frankie Sue Del Papa
Nevada Attorney General
Office of the Attorney General
Capitol Complex
Carson City, Nevada 89710

Joan D. Buckley, Esq. (Proposed Counsel)
302 E. Carson
Suite 508
Las Vegas, Nevada 89101

Dated Dec. 23, 1996

/s/ Antonio T. Slack
Antonio T. Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH AFFIDAVIT IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL

STATE OF NEVADA WHITE PINE COUNTY	) ss.	AFFIDAVIT OF ANTONIO T. SLACK

I, Antonio T. Slack, considering myself duly sworn and under oath, pursuant to 28 U.S.C. Section 1746, hereby state under the penalty of perjury:

1) That I am the Petitioner in the above entitled PETITION FOR WRIT OF HABEAS CORPUS, am of sound mind and over the age of 21, and am competent to testify to all matters herein;

2) That the MOTION FOR APPOINTMENT OF COUNSEL (to which this affidavit is attached) is made for the following reasons:

a) I am an indigent state prisoner, confined in prison and thus cannot to [sic] retain counsel at my own expense. I have previously been granted full *in forma pauperis* status by this Court;

b) The issues involved in this case are complex, and require the services of an experienced attorney to effectively present them to this Court and I am not well enough versed in law to adequately present them;

c) That to adequately present to the Court the issues in this matter, investigation(s) would have to be made which this incarcerated Petitioner is not capable of;

d) The institution where Petitioner is confined has a very limited law library program. Access times are inadequate to conduct meaningful research and necessary research materials are either missing or not even 'stocked' in the library;

e) The interests of justice and due process dictate that appointed counsel is warranted in this case, given the complex issues and Petitioner's incarceration.

3) That I have contacted Joan D. Buckley, Esq. concerning this case, and she has agreed to accept appointment to the case by this Court.

FURTHER AFFIANT SAYTH [sic] NAUGHT

I declare and verify under penalty of perjury that the foregoing is true and correct to the best of my own personal knowledge or belief.

Dated Dec. 23, 1996

/s/ Antonio T. Slack
Antonio T. Slack
Ely State Prison

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH ORDER APPOINTING COUNSEL

HAVING CONSIDERED PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL, and good cause appearing,

IT IS HEREBY ORDERED that Joan D. Buckley, Esq., 302 E. Carson, Suite 508, Las Vegas, Nevada 89101, is appointed to represent and assist Petitioner in the above entitled petition for writ of habeas corpus.

David W. Hagen
District Court Judge

FRANKIE SUE DEL PAPA
Attorney General
ROBERT E. WIELAND
Deputy Attorney General
Criminal Justice Division
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 687-3529

Attorney for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL

Respondents, by and through counsel, Frankie Sue Del Papa, Attorney General of the State of Nevada, oppose petitioner's motion for appointment of counsel. This opposition is made and based on the attached points and authorities as well as all other pleadings, documents and exhibits on file in the above-entitled matter.

ARGUMENT

Petitioner Antonio T. Slack (hereinafter Slack) has filed a motion for the appointment of counsel. Slack claims that he has contacted an attorney who would

accept an appointment to represent him. Slack claims that access to the prison library is limited, that he has limited knowledge of the law, and that the issues that he presents in this case are complex and will require investigation. None of the representations made by Slack justify the appointment of counsel.

18 U.S.C. § 3006A(a)(2)(B) gives the district court discretion to appoint counsel when it determines that the "interests of justice" require representation. Counsel must be appointed if an evidentiary hearing is required. Rule 8, 28 U.S.C. foll. § 2254; *Bashor v. Risley*, 730 F.2d 1228 at 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). Otherwise, appointment of counsel rests with the district court's discretion. A district court abuses its discretion in declining to appoint counsel if due process violations will occur absent representation. *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993).

Slack has no constitutional right to counsel in a federal habeas corpus proceeding. *See Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985); *Knaubert v. Goldsmith*, 791 F.2d 722, 729 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986).

Whether or not the issues in this case will require investigation remains to be seen. Contrary to Slack's assertion, the issues presented in this action are not complex. Slack does not aver that his limited access to the prison law library falls below constitutional requirements or that the materials contained therein fall below constitutional requirements. Slack has made no averment that any limitation prevented him from litigating this action. That Slack has limited knowledge of the law does not require this Court to appoint counsel for him. None of the

representations made by Slack, even if true, either singly or taken as a whole either justify or require this Court to appoint counsel for Slack.

Based upon the foregoing, Respondents respectfully submit this Court should deny Slack's motion for the appointment of counsel.

RESPECTFULLY SUBMITTED this 9th day of January, 1997.

/s/ FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Robert E. Wieland
ROBERT E. WIELAND
Deputy Attorney General
Criminal Justice Division
(702) 687-3529

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 9th day of January, 1997, I served a copy of the foregoing OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL, by mailing a copy thereof to:

ANTONIO T. SLACK, #31395
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

/s/ Dorene A. Wright

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH ORDER APPOINTING COUNSEL (Filed Feb. 13, 1997)

The motion for leave to proceed *in forma pauperis* shows that petitioner lacks the resources necessary to employ counsel to prosecute this habeas corpus proceedings in which he attacks the validity of his conviction and sentence. It appears to be in the best interest of justice that counsel be appointed to represent petitioner herein. Therefore, petitioner named above being financially unable to employ counsel, and because the interests of justice so require, the Federal Public Defender for the District of Nevada shall be appointed to represent petitioner.

Counsel for petitioner shall contact petitioner within twenty (20) days and: (a) review the procedures applicable in cases under 28 U.S.C. § 2254; (b) discuss and explore with petitioner, as fully as possible, the potential grounds for habeas corpus relief in Petitioner's case; and (c) advise petitioner that all possible grounds for habeas corpus relief should be raised at this time, and that the failure to do so may result in loss of the omitted grounds under the rules regarding abuse of the writ.

IT IS THEREFORE **ORDERED** that petitioner's Motion for Appointment of Counsel is GRANTED to the extent that the Federal Public Defender for the District of Nevada is hereby appointed to represent petitioner in these proceedings. The Clerk of the Court shall send a copy of this order to the Federal Public Defender with a copy of the amended petition for writ of habeas corpus (#31).

IT IS FURTHER **ORDERED** that counsel for petitioner shall file an amended petition for writ of habeas corpus within forty-five (45) days or a notice to the court indicating his or her intent to proceed with the current amended petition (#31).

IT IS FURTHER **ORDERED** that respondents' Motion for Enlargement (#42) is DENIED as moot.

IT IS FURTHER **ORDERED** that petitioner's Motion for Judgment on the Pleadings (#38) is DENIED. Such a motion is inappropriate until the pleadings have closed.

Dated this 13th day of February, 1997.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

FRANNY A. FORSMAN
Federal Public Defender
DEBORAH A. TREVINO
Assistant Federal Public Defender
Attorney for Petitioner
330 South Third Street, Suite 700
Las Vegas, NV 89101

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. E.K. McDaniel, Warden, Ely State Prison, and The Attorney General of the State of Nevada, Respondents	**CASE NO.** CV-N-95-194-DWH **THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY (NOT SENTENCED TO DEATH)** (Filed 97 Dec 24)

Petitioner alleges as follows:

1. The challenged conviction was entered in the District Court for the Eighth Judicial District of Nevada, Las Vegas, Nevada, Hon. Earl White, presiding.

2. Judgment of conviction was entered May 16, 1990.

3. An appeal was filed with the Nevada Supreme Court; the appeal was decided November 5, 1991.

4. A petition for post-conviction relief was filed on July 10, 1992 in the Eighth Judicial District Court. The court denied the petition on September 2, 1992 and an appeal was taken: the appeal was decided on December 30, 1993.

5. One previous petition for relief was filed pursuant to 28 U.S.C. §2254 in Case No. CV-N-91-561-HDM. It was dismissed without prejudice on February 19, 1992.

6. No other pleadings or actions are pending in any other court.

7. Petitioner was convicted by jury trial of second degree murder with the use of a deadly weapon in Case No. C-89-92060. Petitioner received two consecutive sentences of life with the possibility of parole. Petitioner began serving his sentence on May 16, 1990.

8. Petitioner was represented by the following attorneys in state court:

Pre-trial and Trial: Deputy Public Defenders Victor Austin and Michael Gardner

Appeal: Deputy Public Defender Michael Gardner (brief); Public Defender Steve Dahl (oral argument).

Post-conviction Petition: Pro Se

Appeal from Denial of Post-conviction relief: Pro Se

FACTUAL SUMMARY

9. Petitioner was charged with killing Alanna Holmes on November 4, 1989. Ms. Holmes died as a result of a shotgun wound. Petitioner admitted, at trial to shooting Ms. Holmes with a shotgun but asserted that the shooting was accidental. Antonio Slack admitted that he shot and was responsible for the death of the decedent Alanna Holmes.

STATEMENT OF PRIOR PROCEEDINGS

10. The Judgment of Conviction-Case No. C89-92060

Petitioner challenges his conviction imposed in Criminal Case No. C89-92960 in the Eighth Judicial District Court for the State of Nevada, in and for the County of Clark. Slack pleaded not guilty and was convicted following a jury trial. Sentence was imposed for second degree murder with the use of a deadly weapon. Slack was sentenced to the Nevada state prison for a term of life with the possibility of parole (second degree murder) and a consecutive term of life with the possibility of parole (use of a deadly weapon).

11. The Direct Appeal-Nevada Supreme Court Docket No. 21421

An appeal was taken to the Nevada Supreme Court raising the following issues:

Issue One: Whether insufficient evidence was adduced at trial to convict the defendant of second degree murder with use of a deadly weapon?

Issue Two: Whether the trial court improperly allowed prejudicial evidence of a sexual relationship between the defendant and the twelve year old victim?

Issue Three: Whether the reasonable doubt jury instruction given by the trial court violated the due process clause of the United States and Nevada constitution?

Issue Four: Whether the court erred by not adequately defining premeditation in the jury instructions regarding murder?

On September 11, 1991, Deputy Public Defender Steve Dahl argued petitioner's direct appeal before the Nevada Supreme Court. Mr. Dahl did not author the appellate brief. At oral argument, Mr. Dahl indicated that he would present argument only on Issue Two. On November 5, 1991, the Nevada Supreme Court issued an order dismissing the appeal.

12. State Petition for Writ of Habeas Corpus (Post Conviction) *Slack v. State of Nevada*, Case No. C-92960

On July 10, 1992, petitioner, in proper person, filed a Post Conviction Petition for Writ of Habeas Corpus in the Eighth Judicial District Court. The petition raised the following grounds:

Ground One: Petitioner was denied his Sixth Amendment right to effective assistance of counsel pre-trial and at trial.

Ground Two: Petitioner was denied his Sixth Amendment right to effective assistance of counsel on direct appeal.

Ground Three: The trial court violated petitioner's Sixth and Fourteenth Amendment rights to a fair and impartial trial.

Ground Four: There was prosecutorial misconduct in petitioner's trial that prejudiced petitioner.

The petition for post conviction relief was denied in District Court, Clark County, Nevada on September 2, 1992. A formal order memorializing the court's decision was filed on February 11, 1993.

13. Appeal from order denying state Petition for Habeas Corpus (Post-Conviction) *Slack v. State of Nevada,* Case No. C-92060.

On December 30, 1993, the Nevada Supreme Court entered an Order dismissing the appeal from the denial of post conviction relief. Exhibit 3.

GROUNDS FOR RELIEF

15. **Ground One:**

Insufficient evidence was adduced at trial to support a conviction for the crime of Second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Slack admitted that he shot and was responsible for causing the death of decedent, Alanna Holmes. He maintained before and throughout trial that the shooting was accidental. No motive was ever established for the shooting. Although Mr. Slack told different versions of the events leading up to the shooting, he consistently maintained that the death of Alanna Holmes was an accident. He testified that the inconsistencies in his prior statements were motivated primarily by fear, youth and inexperience.

The government failed to present any evidence that the shooting was not accidental. The government called only one expert witness, Dr. Sheldon Green, chief medical examiner in the Clark County coroner's office. On direct examination, Dr. Green rendered an opinion that the shooting was inconsistent with an accidental *self inflicted* shooting when asked whether the death was

accidental. He indicated that accident was a possibility but then volunteered that his scientific opinion was influenced by "the circumstances of discovery and what other information". CR 15 at Exhibit 9. The prosecutor did nothing to clear up this obvious confusion and the jury was left with the misapprehension that his testimony concerned the scientific possibility of an accidental death not an accidental self-inflicted injury. No other proof was adduced which showed that the shooting was other than accidental.

Statement of Exhaustion

This ground was raised on direct appeal and in state post-conviction proceedings.

16. **Ground Two:**

Petitioner was Denied His Right to Due Process Under the Fifth and Fourteenth Amendment because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him.

Petitioner was charged with "open murder" by information filed on December 29, 1989. CR 15 at Exhibit 3. That information read in pertinent part: "That Antonio Tonton Slack, on or about the 4th day of November, 1989 . . . did then and there, without authority of law and with malice aforethought, wilfully and feloniously kill, ALANNA HOLMES, a human being, by shooting at and into the body of the said ALANA [sic] HOLMES, with a deadly weapon, to-wit: a firearm". The information made no mention of premeditation and deliberation required

by Nev. Rev. Stat. 200.300(2) (definition of first degree murder). Nonetheless, the jury was instructed on first degree murder and the prosecutor argued for a first degree murder conviction.

The information did not place petitioner on notice that, under Nevada law, the state was required to show that he committed the homicide with premeditation and deliberation. Accordingly, his rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated. Moreover, the charging document did not allege any facts to support the allegation that Mr. Slack committed the crime with the requisite premeditation and deliberation.

Statement of Exhaustion: This ground was not raised either on direct appeal or in state post-conviction proceedings.

17. **Ground Three:**

The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The trial court improperly allowed the prosecutor to ask the defendant whether he had sexual intercourse with the twelve year old decedent. Mr. Slack was nineteen at the time of his trial. The State did not allege nor did it attempt to prove that the shooting involved an attempted rape or any other improper sexual conduct or motivation. In fact, the prosecutor emphasized during his closing argument that "I'm not trying to say this was a

rape. Its very obvious this little girl had an infatuation, a crush on the defendant." CR 15 at Exhibit 10.

The implication that Mr. Slack had sexual intercourse with the decedent was not relevant to the issues to be decided by the jury at trial. However, the prosecutor's question was so prejudicial that it could serve no other purpose but to inflame the jury to the irreparable detriment of the defendant's right to a fair trial. The mere suggestion that Slack may have had sexual intercourse with a twelve year old girl made it more likely than not that the jury would not properly weigh the evidence. The trial court's failure to exclude evidence with highly prejudicial value and no relevance resulted in a fundamentally unfair and unjust trial and verdict.

Statement of Exhaustion: This claim was raised on direct appeal and in state post-conviction proceedings.

18. **Ground Four:**

The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

A. The reasonable doubt instruction was unconstitutional.

The reasonable doubt instruction was unconstitutional because it minimized the state's burden of proof. The trial court gave the following jury instruction defining reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors,

> after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, nor merely possibility or speculation. CR at Exhibit 11.

The above instruction inflates the constitutional standard necessary for acquittal, and giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than constitutionally required.

The principle defect of the instruction is the second sentence: "reasonable doubt" is not mere possible doubt, but is such doubt as would govern or control a person in the more weighty affairs of life." This language is an appropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt, rather than the standard of reasonable doubt itself. This language is also an historical anomaly; as far as can be determined, no other state currently uses the "govern or control" language in its reasonable doubt instruction, and the few states that previously used it have since disapproved it.

The final sentence of the instruction is also constitutionally infirm. That sentence states "doubt to be reasonable must be actual and substantial, not mere possibility or speculation." The language is functionally identical to language condemned by the United States Supreme Court and, when read in combination with the "govern or control" language, creates a reasonable likelihood that the jury would convict and sentence based on a

lesser standard of proof than the Constitution requires. This structural error is *per se* prejudicial and no showing of specific prejudice is required.

Statement of Exhaustion: This claim was raised on direct appeal and in state post-conviction proceedings.

B. The premeditation and deliberation instruction was unconstitutional.

The trial court gave the following instruction:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of mind. For if the Jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

CR 15 at Exhibit 11.

By injecting the concept of "instantaneous" premeditation and deliberation into this proceeding, the giving of this instruction created a reasonable likelihood that the jury would convict and sentence on a charge of first degree murder without any rational basis.

Despite the requirement that first degree murder be both "premeditated and deliberate", the jury that convicted Mr. Slack was instructed in a manner that read the

dual elements as a single term, and deprived those elements of all substantive content beyond the definition of an intent to kill. By so confusing these terms, the instruction failed to provide the jury with any rational or meaningful guidance as to the concept of "premeditation and deliberation".

The vague "premeditation and deliberation" instruction given in Mr. Slack's trial (which does not require any sort of *pre*meditation at all) violated the constitutional guarantee of due process of law because it is so bereft of meaning as to the definition of two elements of the offense of first degree murder as to allow unlimited prosecutorial discretion in charging decisions. This instruction also left the jury without adequate standards by which to assess culpability and made the ability to defend against these charges virtually impossible, due to the inability to discern what the government needs to prove to establish the elements of the charged offense.

The prosecutor focused on the "premeditation and deliberation" instruction by stating during closing argument:

> "Some people come into a murder trial with the notion that premeditation is something you have to plan weeks ahead of time. There has to be a certain time interval wherein the party decides to kill and he in fact kills. Instruction No. 8 given to you by the court dispels that notion. It informs you in paragraph one that premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Then his honor goes on to say in paragraph two beginning at line six, 'premeditation need not be

> for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind.' The key issue is that the defendant, for whatever reason, for whatever motivation, decided to kill either at the time or immediately before he inflicted the fatal wound. Undoubtedly what happened on an impulse, a decision was made in the bedroom after he went into the bedroom . . . The point I'm making is that the definition of premeditation is a design, a determination to kill. But you don't have to form that at any set period before the fatal blow or wound is inflicted. It may be as instantaneous as successive thoughts of the mind. CR 15 at Exhibit 10.

Statement of Exhaustion: This claim was raised on direct appeal and in state post-conviction proceedings.

C. The malice aforethought instruction was unconstitutional.

The jury was given the following instruction on "malice aforethought":

> Express Malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned or malignant heart.

The giving of this instruction deprived Mr. Slack of his constitutional rights by creating a reasonable likelihood that the State would be relieved of its burden to prove each element of the offense beyond a reasonable

doubt. Such an instruction subverted the presumption of innocence afforded to accused persons and also invaded the truth-finding task of the jury.

The primary failing of the "implied malice" instruction is that it created a mandatory presumption that malice shall be implied both in the absence of provocation and when the circumstances of the killing show "abandoned or malignant heart". This explicit and unqualified command directly foreclosed independent jury consideration of whether the facts established "malice aforethought" an essential element of the offenses with which Mr. Slack was charged.

The instruction also poses substantial problems with respect to the specified "basic-facts" – lack of provocation or an "abandoned and malignant heart" – from which malice shall be implied. These supposed circumstances are so cryptic and metaphysical that they are meaningless without further definition. Such language might also easily permit a jury to equate malignant heart with an evil disposition or despicable character, which could then lead the jury, especially in a close case, to find the existence of malice aforethought because it believes the accused to be a bad person.

The giving of the unconstitutional "implied malice" instruction substantially and injuriously affected the process to such an extent as to render Mr. Slack's conviction and sentence fundamentally unfair. The State cannot show, beyond a reasonable doubt that this instruction did not affect the conviction.

Statement of Exhaustion: This claim was not raised on direct appeal nor in state post-conviction proceedings.

19. **Ground Five:**

Petitioner was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution

A. Trial counsel failed to take any action to prevent the introduction of highly prejudicial evidence of sexual contact between the defendant and the 12 year old decedent.

Pursuant to pre-trial discovery, trial counsel was on notice that the government claimed that petitioner, during interrogation, told a North Las Vegas police officer that he had sexual intercourse with the decedent, Alanna Holmes on one occasion on October 31, 1989. Nonetheless, trial counsel failed to attempt to exclude such evidence prior to trial. Had counsel filed such a motion, he would have received a ruling pre-trial as to whether the trial court would permit this highly prejudicial and inflammatory evidence. By seeking such a ruling in advance of trial, counsel would have been able to effectively advise his client whether to testify on his own behalf or whether to proceed to trial at all rather than pursue a negotiated plea. Trial counsel did not have a tactical or strategic reason for failing to seek a pre-trial ruling on the admissibility of this highly prejudicial and irrelevant evidence.

In fact, the performance of trial counsel was so deficient that he failed to protect against "opening the door" during direct examination of the petitioner. During direct examination trial counsel elicited the following:

Q Did you have a relationship of boyfriend and girlfriend?

A No

On cross examination, the prosecutor impeached petitioner with the following:

Q You testified on direct examination that you did not have a boyfriend/girlfriend relationship with Alanna Holmes?

A Yes

Q How long had you known her?

A I'd say around three months?

Q Around three months?

A Yes

Q You knew her on Halloween, 1989, didn't you?

A Yes

Q What do you mean by boyfriend/girlfriend relationship?

A Just like if we go together. Like if say you was a girl and I asked you would you want to go steady, like going steady, then that's what I call boyfriend/girlfriend relationship?

Q If I was a girl and I let you do certain things with my body, would that make me your girlfriend?

A Sometimes

Q Did you do something with Alanna Holmes on Halloween 1989?

A No

Q You didn't tell the North Las Vegas Police Department that you had sex with her on Halloween 1989?

Trial counsel permitted this entire line of questioning before objecting. By the time an objection was made, the damage was already done. The trial court permitted the testimony overruling the untimely objection because the defense had opened the door. Once this testimony was elicited, Mr. Slack's case was irreparably harmed. Counsel's failure to effectively prepare and conduct direct examination and to register a timely objection was a dereliction of his duty to perform as a reasonable and competent counsel. Trial counsel did not have a tactical or strategic reason for his failure.

B. Trial Counsel failed to object to the jury instruction given by the court on reasonable doubt.

The reasonable doubt instruction was unconstitutional because it minimized the state's burden of proof. The trial court gave the following jury instruction defining reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable

> doubt. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation. CR at Exhibit 11.

The above instruction inflates the constitutional standard necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than constitutionally required.

The principle defect of the instruction is the second sentence: reasonable doubt "is not mere possible doubt, but is such doubt as would govern or control a person in the more weighty affairs of life." This language is an appropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt, rather than the standard of reasonable doubt itself. This language is also an historical anomaly; as far as can be determined, no other state currently uses the "govern or control" language in its reasonable doubt instruction, and the few states that previously used it have since disapproved it.

The final sentence of the instruction is also constitutionally infirm. That sentence states "doubt to be reasonable must be actual and substantial, not mere possibility or speculation." The language is functionally identical to language condemned by the United States Supreme Court and, when read in combination with the "govern or control" language, creates a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the Constitution requires. This structural error is *per se* prejudicial and no showing of specific prejudice is required.

Trial counsel failed to interpose any objection to the unconstitutional instruction on reasonable doubt or to offer an alternative, constitutional instruction thus depriving him of his Sixth and Fourteenth Amendment right to effective assistance of counsel. Trial counsel could have had no tactical or strategic reason for failing to require the jury to be properly instructed.

C. Trial counsel failed to object to the jury instruction given by the court on premeditation and deliberation.

The trial court gave the following instruction:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the Jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

CR 15 at Exhibit 11.

By injecting the concept of "instantaneous" premeditation and deliberation into this proceeding, the giving of this instruction created a reasonable likelihood that the jury would convict and sentence on a charge of first degree murder without any rational basis.

Despite the requirement that first degree murder be both "premeditation and deliberate", the jury that

convicted Mr. Slack was instructed in a manner that read the dual elements as a single term, and deprived those elements of all substantive content beyond the definition of an intent to kill. By so confusing these terms, the instruction failed to provide the jury with any rational or meaningful guidance as to the concept of "premeditation and deliberation".

The vague "premeditation and deliberation" instruction given in Mr. Slack's trial (which does not require any sort of *pre*meditation at all) violated the constitutional guarantee of due process of law because it is so bereft of meaning as to the definition of two elements of the offense of first degree murder as to allow unlimited prosecutorial discretion in charging decisions. This instruction also left the jury without adequate standards by which to assess culpability and made the ability to defend against these charges virtually impossible, due to the inability to discern what the government needs to prove to establish the elements of the charged offense.

The prosecutor focused on the "premeditation and deliberation" instruction by stating during closing argument:

> "Some people come into a murder trial with the notion that premeditation is something you have to plan weeks ahead of time. There has to be a certain time interval wherein the party decides to kill and he in fact kills. Instruction No. 8 given to you by the court dispels that notion. It informs you in paragraph one that premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Then his honor goes on to say in paragraph two

> beginning at line six, 'premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind.' The key issue is that the defendant, for whatever reason, for whatever motivation, decided to kill either at the time or immediately before he inflicted the fatal wound. Undoubtedly what happened on an impulse, a decision was made in the bedroom after he went into the bedroom . . . The point I'm making is that the definition of premeditation is a design, a determination to kill. But you don't have to form that at any set period before the fatal blow or wound is inflicted. It may be as instantaneous as successive thoughts of the mind. CR 15 at Exhibit 10.

Trial counsel failed to interpose any objection to the unconstitutional instruction on premeditation and deliberation or to offer an alternative instruction thus depriving petitioner of his Sixth and Fourteenth Amendment rights to effective assistance of counsel. Trial counsel could have had no tactical or strategic reason for failing to protect the petitioner from an improperly instructed jury. The failure as to this issue is particularly prejudicial to the defendant's right to due process as the defendant's defense was that the shooting was accidental and the instruction essentially removed the requirement of premeditation as an element of the crime.

D. Trial counsel failed to object to the jury instruction given by the court on malice aforethought.

The jury was given the following instruction on "malice aforethought":

> Express Malice is that deliberate intention unlawfully to take away the life of a fellow

creature, which is manifested by external circumstances capable of proof.

Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned or malignant heart.

The giving of this instruction deprived Mr. Slack of his constitutional rights by creating a reasonable likelihood that the State would be relieved of its burden to prove each element of the offense beyond a reasonable doubt. Such an instruction subverted the presumption of innocence afforded to accused persons and also invaded the truth-finding task of the jury.

The primary failing of the "implied malice" instruction is that it created a mandatory presumption that malice shall be implied both in the absence of provocation and when the circumstances of the killing show "abandoned or malignant heart". This explicit and unqualified command directly foreclosed independent jury consideration of whether the facts established "malice aforethought" an essential element of the offenses with which Mr. Slack was charged.

The instruction also poses substantial problems with respect to the specified "basic-facts" – lack of provocation or an "abandoned and malignant heart" – from which malice shall be implied. These supposed circumstances are so cryptic and metaphysical that they are meaningless without further definition. Such language might also easily permit a jury to equate malignant heart with an evil disposition or despicable character, which could then lead the jury, especially in a close case, to find

the existence of malice aforethought because it believes the accused to be a bad person.

The giving of the unconstitutional "implied malice" instruction substantially and injuriously affected the process to such an extent as to render Mr. Slack's conviction and sentence fundamentally unfair. The State cannot show, beyond a reasonable doubt that this instruction did not affect the conviction.

Trial counsel failed to interpose any objection to the unconstitutional instruction on malice aforethought or to offer an alternative, constitutional instruction thus depriving him of his Sixth and Fourteenth Amendment right to effective assistance of counsel. Trial counsel could have had no tactical or strategic reason for failing to require the jury to be properly instructed on malice aforethought. The failing as to this instruction deprived the defendant of his right to present a defense.

E. Trial Counsel failed to investigate the facts of the case and develop available defenses

Trial Counsel did not conduct even the semblance of an investigation. He failed to investigate and develop the defense of accident. Trial counsel did not obtain expert assistance or utilize expert witnesses. Expert testimony should have been presented to disprove the testimony of the state's single expert witness, Sheldon Green, MD. Had Mr. Gardener utilized the testimony of an independent expert, it is likely he would have refuted Dr. Green's opinion that the decedent's death was inconsistent with a "self-inflicted accidental" shooting. An expert witness could have explained to the jury how the

death was consistent with an accidental (not self-inflicted) injury.

Further, defense counsel failed to obtain expert assistance regarding he portion of the weapon seized by North Las Vegas police department officials. Had trial counsel consulted with an expert and submitted the portion of the weapon for independent testing, it is likely that the results would have been consistent with the presentation of the defense of accident.

20. **Ground Six:**

Petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment

A. Appellate counsel failed to raise the following issues on direct appeal:

1. Petitioner was Denied His Right to Due Process Under the Fifth and Fourteenth Amendment because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him.

2. The malice aforethought instruction was unconstitutional.

B. Appellate counsel conceded two of the four issues raised depriving petitioner of any effective review on direct appeal of the conviction.

Deputy Public Defender, R. Michael Gardner was appointed to represent petitioner on his direct appeal. Mr. Gardner prepared the appellate brief on petitioner's behalf. However, Steve Dahl, another employee of the

Clark County Public Defender's Office gave the oral argument on petitioner's behalf. Mr. Dahl indicated at oral argument that he did not "do the trial" nor "write this brief", and he would not be presenting argument on three of the four issues raised in petitioner's brief. Furthermore, he went one step beyond simply not arguing and left the Nevada Supreme Court with the impression that he conceded two of the issues raised by indicating: 1) that Issue One alleged that insufficient evidence was adduced at trial to support a conviction for second degree murder was "not worth arguing;" and 2) that Issue Four challenging the premeditation and deliberation instruction "did not fit into the facts of this case" Transcript of Appellate Argument page one, Petitioner's Exhibit two.

Petitioner's appellate counsel at oral argument did not have a tactical or strategic reason for giving the Nevada Supreme Court the impression that he was conceding issues One and Four. Counsel's carelessness in doing so deprived petitioner of his right to effective appellate counsel.

21. **Ground Seven:The doctrine of cumulative error mandates relief**

The combination of the failure of advocacy on the part of trial and appellate counsel, judicial abuse of discretion, constitutional error and all other issues raised in this petition when reviewed in light of this record, constitutes cumulative error warranting relief.

22. **REQUEST FOR RELIEF**

WHEREFORE, Petitioner prays this court to enter an order granting the Writ of Habeas Corpus:

1. Issue a Writ of Habeas Corpus to have petitioner brought before the court, so that he might be discharged from his unconstitutional confinement and restraint;

2. Conduct an evidentiary hearing in which proof may be offered concerning the allegations set forth in this petition and any affirmative defenses raised by Respondent.

3. Grant Petitioner the authority to obtain subpoenas for witnesses and documents necessary to prove the facts alleged in this Petition;

4. Require Respondents to bring fourth all pertinent records not previously produced so that this Court can review those parts of the record relevant to the issues raised in this Petition; and

5. Grant such further relief as the interests of justice may require.[1]

Dated this 19th day of December, 1997.

/s/ Deborah A. Trevino
Deborah A. Trevino
Assistant Federal Public Defender
Attorney for Petitioner

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[1] Due to the difficulties in mail service within the Nevada State Prison, verification by the petitioner of the Amended Petition will be provided upon its receipt.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on December 23, [pmr] 1997, she served a copy of the above and foregoing documents by placing a true and correct copy in the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh
Deputy Attorney General
Criminal Division
100 N. Carson Street
Carson City, NV
89701-4717

Antonio Slack
#3395
Ely State Prison
PO Box 1989
Ely, NV 89301

/s/ Pamela M. Ramage
Pamela M. Ramage
Legal Assistant

FRANKIE SUE DEL PAPA
Attorney General
JULIE A. SLABAUGH
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100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (702) 687-3529

Attorneys for Respondents.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ANTONIO A. SLACK, Petitioner, vs. E. K. MC DANIEL, Warden, et. al., Respondents.	Case No. CV-N-95-194-DWH **MOTION TO DISMISS SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY**

COMES NOW, Respondents by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and hereby moves this honorable Court for an order dismissing Petitioner's "Second Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 by a Person in State Custody."[1] This motion is made and

[1] Petitioner has actually filed a third amended petition which he has erroneously titled his second amended petition. Throughout the rest of this motion Respondents will refer to Petitioner's third amended petition to avoid any confusion in the future.

based on the points and authorities attached hereto as well as all of the documents and pleadings on file herein.

POINTS AND AUTHORITIES

I.

PROCEDURAL HISTORY

On December 29, 1989, an information was filed in the Eighth Judicial District Court of the State of Nevada in and for Clark County charging Petitioner ANTONIO SLACK (hereinafter SLACK) with Murder With the Use of a Deadly Weapon. (Exhibit 3.)[2] On February 22, 1990, SLACK was convicted, pursuant to a jury verdict, of Second Degree Murder With the Use of a Deadly Weapon. (Exhibit 12.) On May 23, 1990, a judgment of conviction was filed stating that SLACK was sentenced to a term of life with the possibility of parole for Second Degree Murder and a consecutive term of life with the possibility of parole for the use of a deadly weapon. (Exhibit 13.)

SLACK appealed his conviction to the Nevada Supreme Court and on February 4, 1991, he filed his opening brief. (Exhibit 20.) In his brief SLACK claimed there was insufficient evidence adduced at his trial to convict him; that the trial court improperly allowed evidence of a sexual relationship between SLACK and the twelve-year-old victim, based on state law; that the reasonable doubt jury instruction given at his trial violated the due process clause of the United States and Nevada

[2] All references to exhibits are to the exhibits filed herein on September 15, 1995, unless otherwise noted.

constitutions; and that the trial court erred by not adequately defining premeditation in the jury instructions, based on state law. *Id.*

On November 5, 1991, the Nevada Supreme Court filed its order dismissing SLACK's appeal. (Exhibit 22.) The Nevada Supreme Court concluded that the prosecution's reference to the intimate relationship of SLACK and the victim was properly admitted as evidence of SLACK's credibility after he denied having a boyfriend/girlfriend relationship with the victim. *Id.* At oral argument, SLACK's counsel conceded that the other issues raised in the brief were without merit. *Id.*

On November 27, 1991, SLACK filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 by a person in State Custody in the United States District Court for the District of Nevada. (Exhibit 25.) In his first federal petition SLACK raised the following issues: insufficient evidence was adduced at trial to convict him of Second Degree Murder; the trial court improperly allowed prejudicial evidence of a sexual relationship between SLACK and the twelve-year-old victim; the reasonable doubt instruction violated the due process clause of the United States and Nevada constitutions; and the trial court erred in not adequately defining premeditation in jury instructions regarding murder. *Id.* On February 19, 1992, SLACK's first federal petition was dismissed without prejudice so that he could exhaust his state remedies. (Exhibit 27.)

On July 10, 1992, SLACK filed a petition for writ of habeas corpus (post-conviction) in the Eighth Judicial District Court of the State of Nevada in and for the

County of Clark. In his petition SLACK claimed as ground 1 that he was denied the effective assistant [sic] of counsel at pre-trial and trial in that his counsel: 1) failed to find out what kind of deal was made with Kamal Bey; 2) failed to file a pre-trial motion in limine to stop the introduction of prior sexual relations with the victim; 3) failed to file a pre-trial motion in limine to stop the testimony of Kamal Bey, as his deal was based on his trial testimony; 4) failed to interview SLACK's brother to refute the testimony of Kamal Bey; 5) failed to ask Kamal Bey what deals he made with the state for his testimony; 6) failed to request an accomplice instruction; 7) failed to have it presented to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey, SLACK's co-defendant; and 8) these alleged errors prejudiced him. *Id.*

As ground two, SLACK claimed that he had ineffective assistance of counsel on his direct appeal in that his appellate counsel: 1) failed to raise a Franklin violation on appeal; 2) failed to raise the issue that counsel failed to request an accomplice instruction; 3) failed to raise the issue that Kamal Bey was a co-defendant and his testimony was questionable; and 4) failed to raise the issue there was prosecutorial misconduct when the prosecutor failed to inform the jury that Kamal Bey was a co-defendant as well as the fact that Bey's fingerprints were the only fingerprints found on the murder weapon. *Id.*

As ground three, SLACK claimed that the trial court deprived him of his rights under the Sixth and Fourteenth Amendments to a fair and impartial trial when the court failed to properly instruct the jury on accomplice testimony and the trial court improperly instructed the

jury on premeditation. *Id*. As ground four, SLACK claimed that the prosecutor committed misconduct by withholding from the jury that the only fingerprints found on the murder weapon were those of Kamal Bey and that he was a co-defendant in the case. *Id*.

On February 11, 1993, the state district court denied SLACK's petition for post-conviction relief. (Exhibit 37.) SLACK appealed and on December 30, 1993, the Nevada Supreme Court dismissed his appeal (Exhibit 39.) The Nevada Supreme Court found that SLACK's claims were repelled by the record. Specifically the Nevada Supreme Court found the terms of the state's agreement with Bey were fully disclosed to the jury. The Court found that SLACK's theory of the case was that he accidentally shot the victim and noted that SLACK testified that his finger was on the trigger when the gun fired. Therefore it was irrelevant that Bey's fingerprints were found on the weapon. The Nevada Supreme Court also found that Bey was neither an accomplice nor a co-defendant and SLACK was not prejudiced by the lack of an accomplice testimony instruction. The Court also noted that the remaining claims were similarly repelled by the record. *Id*.

On May 30, 1995, SLACK filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 with this Court. On September 15, 1995, Respondents filed a motion to dismiss SLACK's petition. On August 13, 1996, this Court granted Respondents motion to dismiss to the extent that SLACK had thirty (30) days to file an amended petition. On October 8, 1996 SLACK filed his First Amended Petition for Writ of Habeas Corpus. On

February 14, 1997, this Court appointed the Federal Public Defender's office to represent SLACK. On June 13, 1997, Respondents received SLACK's second amended petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. In his second amended petition SLACK alleged the following grounds: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States constitution; 2) SLACK was denied his right to due process under the Fifth, Sixth, and Fourteenth Amendments because he was charged with "open murder" in an information which did not properly plead each element of first degree murder to impart sufficient notice to him; 3) the trial court improperly allowed other crimes, bad act evidence in violation of the Fifth, Sixth and Fourteenth Amendments to the United States constitution; 4) SLACK was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States constitution; 5) the trial court failed to properly instruct the jury, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States constitution, on reasonable doubt, premeditation and malice aforethought; 6) SLACK was denied the effective assistance of appellate counsel in violation of the Sixth Amendment; and 7) the doctrine of cumulative error mandates relief.

On July 3, 1997, Respondents filed a Motion for More Definite Statement which was granted by this Court on December 3, 1997. On December 29, 1997, Respondents received SLACK's Third Amended Petition. In his Third Amended Petition SLACK sets forth the following

grounds for relief: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 2) Petitioner was denied his right to due process under the Fifth and Fourteenth Amendments because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him, 3) The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 4) The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution; 5) Petitioner was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; 6) Petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment; 7) The doctrine of cumulative error mandates relief.

Respondents now submit their motion to dismiss SLACK's third amended petition. Should this Court deny this motion Respondents reserve the right to answer or otherwise respond to SLACK's third amended petition.

II. ARGUMENT

A. SLACK'S THIRD AMENDED PETITION CONTAINS UNEXHAUSTED GROUNDS AND SHOULD BE DISMISSED.

A federal court should not entertain a petition for habeas corpus relief unless the petitioner has exhausted available and adequate state court remedies with respect to each of the claims contained in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Lindquist v. Gardner*, 770 F.2d 876, 877 (9th Cir. 1985); *Szeto v. Rushen*, 709 F.2d 1340, 1341 (9th Cir. 1983); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983). In this regard, state court remedies have not been exhausted until the petitioner unsuccessfully presents his constitutional claims to the highest available state court through direct appeal or state collateral review proceedings. *See Preiser v. Rodriguez*, 411 U.S. 475, 490-94 (1973); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

The exhaustion doctrine is satisfied "if a petitioner presents his claim to the highest state court and that court disposes of the claim on the merits. . . . " *Hayes v. Kincheloe*, 784 F.2d 1434, 1437 (9th Cir. 1986). The exhaustion requirement is also satisfied if a federal habeas petitioner demonstrates at the time he files his federal petition that "no state remedies are still available to the petitioner and the petitioner had not deliberately bypassed the state remedies." *Bronson v. Swinney*, 648 F. Supp. 1094, 1101 (D.Nev. 1986), *quoting Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

Federal statutory law provides in relevant part that:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. . . . An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(b) & (c).

This exhaustion requirement is a matter of comity designed to afford state courts the first opportunity to remedy a constitutional violation. *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981). Even a petition containing both exhausted and unexhausted claims must be dismissed "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition so as to present only exhausted claims to the district court." *Rose v. Lundy*, 455 U.S. at 510. Both the federal district court and court of appeals may examine the issue of exhaustion *sua sponte*. *Batchelor v. Cupp*, 693 F.2d at 862, *citing Campbell v. Crist*, 647 F.2d 956, 957 (9th Cir. 1981).

The United States Supreme Court has held that, in order for a federal claim to be exhausted, the state courts must be alerted to the fact that the state prisoner is

raising claims under the United States Constitution. *Duncan v. Henry*, 115 S.Ct. 887 (1995). The Ninth Circuit Court of Appeals has stated that a claim is "fairly presented" if the petitioner has described the operative facts and legal theory upon which his claim is based. *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). *See also Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982), *cert. denied*, 459 U.S. 1219 (1983).

Further, the United [sic] Supreme Court has held that raising a claim for the first and only time in a procedural context in which its merits will not be considered, absence special circumstances, does not constitute fair presentation for exhaustion purposes. *Castille v. Peoples*, 489 U.S. 346, 350, 109 S.Ct. 1056, 1060 (1989); *See also, Roettgen v. Copeland*, 33 F.3d 36 (9th Cir. 1994). (Claim was unexhausted when presented to State's highest court in a procedural context in which its merits will not be considered absent special circumstances).

Additionally, the United States Supreme Court has adopted the principle of complete exhaustion and determined that mixed petitions, those petitions containing both exhausted and unexhausted claims, must be dismissed. *Rose v. Lundy*, 455 U.S. 509, 522 (1982).

In this case, grounds two (2) and four (4)(c) were not raised in state court by SLACK's own admission. (Third Amended Petition, pgs. 5 & 9.) Ground three (3) was raised in SLACK's direct appeal, however it was not raised as a violation of the United States Constitution. SLACK's argument in his direct appeal was based solely on state evidentiary law, specifically NRS 48.035 and NRS 48.045. (Exhibit 20, pgs. 15-18.)

In *Duncan v. Henry*, supra, the prisoner, in state court, challenged evidence admitted in his trial on the basis of the California evidence code. In his federal post-conviction petition, the prisoner claimed that the evidentiary error amounted to a denial of due process in violation of the United States Constitution. The Supreme Court held:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 115 S.Ct. 887, 888 (1995).

Since SLACK did not allege, on direct appeal, that the introduction of evidence of sexual misconduct violated his rights under the Fifth and Fourteenth Amendments his allegation in ground three (3) is unexhausted.

In ground five (5), SLACK raises five (5) allegations of ineffective assistance of trial counsel. Only one of SLACK's allegations is exhausted. Ground five, subsections (B) through (E) have never been raised in state court. (*See* Exhibits 20 & 31.) Therefore, the majority of ground five (5) is unexhausted.

In addition, in ground six (6) SLACK raises two allegations of ineffective assistance of appellate counsel. However, neither of SLACK's allegations have been presented to the Nevada courts. (*See* Exhibits 20 & 31.) Therefore, ground six (6) is unexhausted in its entirety.

Finally, ground seven (7) has not been presented to any Nevada court. *Id*. SLACK's third amended petition contains unexhausted grounds. Therefore, it should be dismissed as a mixed petition.

B. THE INSTANT PETITION CONSTITUTES AN ABUSE OF THE WRIT UNDER RULE 9(b).

SLACK has previously litigated a Petition for Writ of Habeas Corpus Pursuant [sic] 28 U.S.C. § 2254 in this Court. (*See* Exhibit 25.) In Case Number CV-N-91-561-HDM, in the United States District Court for the District of Nevada, SLACK raised the following grounds for relief: 1) Insufficient evidence was adduced at trial to convict the Defendant with (sic) second degree murder with use of a deadly weapon; 2) The trial court improperly allowed prejudicial evidence of a sexual relationship between the defendant and the twelve year old victim; 3) The reasonable doubt instruction to jury by trial court violated due process clause of the U.S. and State Constitution (Cage v. Louisiana); 4) Trial court erred by not adequately defining premeditation in jury instructions regarding murder. *Id*.

SLACK subsequently moved to stay Case Number CV-N-91-561-HDM in order to return to state court and exhaust the following claims: 1) Ineffective assistance of counsel during all pretrial and trial proceedings as follows: a) failure to raise a Franklin violation, in that the deal made with petitioner's co-defendant was not completed before his testimony was allowed; and b) that counsel failed to offer and/or request an accomplice and/or informant instruction; 2) That the trial court erred in

not instructing the jury on an accomplice instruction and his testimony; 3) That the trial court erred in allowing the co-defendant to testify prior to the deal being made with him and the state being completed; 4) That there was prosecutorial misconduct, in that the prosecution withheld from the jury the fact that the only fingerprints found on the murder weapon were those of the co-defendants. (Exhibit 26.)

On February 19, 1992, SLACK's federal petition in Case Number CV-N-91-561-HDM was dismissed without prejudice. (Exhibit 27.) SLACK was granted leave to file an application to renew upon exhaustion of all state remedies. *Id.*

In his instant petition SLACK has raised the following issues: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 2) Petitioner was denied his right to due process under the Fifth and Fourteenth Amendments because he was charged with "open murder" in an information which did not pro[illegible]rly plead each element of first degree murder thus failing to impart sufficient notice to him; 3) The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 4) The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution because: A) the reasonable doubt instruction was unconstitutional; B) the premeditation and deliberation instruction was unconstitutional; C) and the malice aforethought

instruction was unconstitutional; 5) Petitioner was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because: A) trial counsel filed [sic] to take any action to prevent the introduction of highly prejudicial evidence of sexual contact between the defendant and the twelve (12) year old victim; B) trial counsel failed to object to the jury instruction given by the court on reasonable doubt; C) trial counsel failed to object to the jury instruction given by the court on premeditation and deliberation; D) trial counsel failed to object to the jury instruction given by the court on malice aforethought; and E) trial counsel failed to investigate the facts of the case and develop available defenses; 6) Petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment because; A) appellate counsel failed to raise the issues that SLACK was denied his right to due process because he was charged with "open murder" in an information which did not properly plead each element of first degree murder and that the malice aforethought instruction was unconstitutional; and B) appellate counsel conceded two of the four issues raised depriving petitioner of any effective review on direct appeal of the conviction; and 7) The doctrine of cumulative error mandates relief.

Grounds two, four (C), five, six and seven were not raised by SLACK in his previous petition. (*See* Exhibit 25.) In fact, none of these grounds were included in the claims SLACK wished to exhaust in State court. (*See* Exhibit 26.) Respondents assert that SLACK's allegations in ground two, four (C), five, six and seven constitute new and different grounds and are therefore barred under Rule

9(b), of the Rules Governing Section 2254 Cases in the United States District Court, because SLACK's failure to assert these grounds in his prior federal petition constitutes an abuse of the writ. *See Farmer v. Angelone*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1474 (1997).

The federal rules regarding habeas petitions state that a "second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Rules Governing Section 2254 Cases, Rule 9(b), 28 U.S.C. foll. § 2254. Thus, the rule covers those situations in which a claim previously addressed is again raised and those situations in which new claims are raised which were not raised in the first petition.

The most recent and thorough case dealing with the issue of successive petitions and abuse of the writ is *McCleskey v. Zant*, 111 S.Ct. 1454 (1991). Although *McCleskey* primarily deals with the issue of good cause, the case contains a fairly thorough discussion and history on abuse of the writ. On a Rule 9(b) issue, it is the government's burden to plead abuse of the writ. *McCleskey* at 1470; *Sanders v. United States*, 373 U.S. 1, 10 (1963). A government meets its burden of pleading if it notes petitioner's prior writ history, indicates the claims appearing for the first time in a successive petition and affirms its belief that petitioner is abusing the writ in the manner prescribed by Rule 9(b). *McCleskey* at 1470. Abuse of the writ may be raised by the court *sua sponte*. *Jones v. Estelle*, 722 F.2d 159, 164 (5th Cir. 1983).

Once abuse of the writ has been alleged, petitioner has the burden of proving that he has not abused the writ. *McCleskey* at 1470; *Price v. Johnston*, 334 U.S. 266, 292 (1948). He must demonstrate "cause" and "prejudice" as those terms are understood in the context of procedural bar, for not presenting the claim in a prior petition. The "cause" element may be excused only if the failure of the federal court to address the claim would constitute a "fundamental miscarriage of justice," i.e., the claim would establish the petitioner's factual innocence. *McCleskey* at 1470-71.

"Cause" in this context means petitioner *could not* have presented the claim in a previous petition because "some objective factor external to the defense impeded counsel's efforts" to raise the claim. *McCleskey* at 1470. For cause to exist, the external impediment must have actually *prevented* petitioner from raising the claim. *McCleskey* at 1470, 1472. Once cause has been established, petitioner must show "actual prejudice" resulting from the errors of which he complains. *McCleskey* at 1470.

To establish "actual prejudice" a habeas petitioner bears the burden of showing not merely that the errors created a possibility of prejudice, but that they work to his actual and substantial disadvantage, "infecting his entire trial with errors of constitutional dimension." Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the petitioner was denied "fundamental fairness" at trial. *Murray v. Carrier*, 477 U.S. 478, 494 (1986); *United States v. Frady*, 456 U.S. 152, 168, 170 (1982); *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989).

Petitioner's opportunity to meet the burden of cause and prejudice *will not include an evidentiary hearing* if the district court determines as a matter of law that petitioner cannot satisfy the standard of cause and prejudice. *McCleskey* at 1470.

The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review. To begin with, the writ strikes at finality. One of the law's very objects is the finality of its judgments. When a habeas petitioner succeeds in obtaining a new trial the "erosion of memory and dispersion of witnesses that occur with the passage of time" prejudice the government diminishing the chances of a reliable criminal adjudication. *McCleskey* at 1468. Finality has special importance in the context of the federal attack on a state conviction. Reexamination of state convictions on federal habeas frustrates both the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights. *McCleskey* at 1469. The federal system recognizes the independent power of a state to articulate societal norms with criminal laws, but the power of a State to pass law means little if the state cannot enforce them. *McCleskey* at 1469.

Federal collateral litigation places a heavy burden on scarce federal judicial resources and threatens the capacity of the system to resolve primary disputes. Habeas review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh. *McCleskey* at 1469; *Reed v. Ross*, 468 U.S. 1, 13 (1984).

Far more severe are the disruptions attached to a successive petition. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system. *McCleskey* at 1469. There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility. *McCleskey* at 1469.

If first round habeas stretches resources, examination of successor petitions spreads the resources thinner still. Likewise, if comity and federalism are offended by a first round habeas, the offense increases when a State must defend its conviction in a second or subsequent federal proceeding on grounds not even raised in the first petition. *McCleskey* at 1469.

However, the above considerations give way when a meritorious constitutional claim is presented in a proper manner in a federal petition. The abuse of the writ rules provide a forum for presentation of meritorious claims and at the same time serve to vindicate the State's interest in finality of judgments. Accordingly, for a second or successive petition, the petitioner must demonstrate cause and prejudice to raise a new issue in such a petition. *McCleskey* at 1469-70.

The question to be answered in determining whether a habeas petitioner has abused the writ by failing to raise a claim in a prior habeas petition is whether the claim was withheld without legal excuse. *Harris v. Pulley*, 885 F.2d 1354, 1369 (9th Cir. 1988).

The abuse of the writ doctrine examines petitioner's conduct: the question is whether petitioner possessed, *or by reasonable means could have obtained*, a sufficient basis to

allege a claim in the first petition and pursue the matter in habeas corpus. *McCleskey* at 1472. The requirement of cause in the abuse of the writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds in a first federal habeas petition. If what petitioner knows *or could discover upon reasonable investigation* supports a claim for belief, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim. *McCleskey* at 1472.

In *Delo v. Stokes*, 110 S.Ct. 1880 (1990) (per curiam), the United States Supreme Court vacated a stay of execution and expressly held it was an abuse of the writ for Stokes to raise a claim which "could have been raised in his first petition for federal habeas corpus." *Id.* at 329. Thus, the Supreme Court has made it clear that presentation of any claim which *could* have been presented in an earlier habeas petition constitutes an abuse of the writ.

Respondents have specifically plead [sic] abuse of the writ. The burden now falls on SLACK to demonstrate cause and prejudice as to why he did not raise his allegations in grounds two, four (C), five, six and seven in his prior petition.

III. CONCLUSION

SLACK's third amended petition contains unexhausted grounds and should be dismissed. In addition, SLACK's inclusion of new and different grounds in his

third amended petition constitutes an abuse of the writ and those claims should be barred.

DATED this 28th day of January, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Julie A. Slabaugh
JULIE A. SLABAUGH
Deputy Attorney General
Criminal Justice Division

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 28th day of January, 1998, I served a copy of the foregoing MOTION TO DISMISS SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY by mailing a trues [sic] copy to the following:

DEBORAH A. TREVINO
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101

/s/ Illegible

FRANNY A. FORSMAN
Federal Public Defender
DEBORAH A. TREVINO
Asst. Federal Public Defender
330 South Third Street, #700
Las Vegas, Nevada 89101
(702) 388-6577

Attorney for Antonio Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner, v. E.K. McDANIEL, et al., Respondents.	CV-N-95-194-DWH **OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY** (Filed Febr. 24, 1998)

COMES NOW, petitioner, Antonio Slack, through his counsel, Deborah A. Trevino, Assistant Federal Public Defender, and opposes the motion to dismiss the petition for a writ of habeas corpus filed in this case by respondent on or about December 28, 1997.

THIS OPPOSITION is based on the following points and authorities and the pleadings and papers on file herein.

DATED this 23rd day of February, 1998.

Respectfully submitted,

/s/ Deborah A. Trevino
DEBORAH A. TREVINO
Assistant Federal
Public Defender

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

Petitioner Antonio Slack is a Nevada State prisoner serving two consecutive sentences of life with the possibility of parole pursuant to a judgment of conviction entered in 1990 in the Eighth Judicial District Court in Las Vegas, Nevada.

Mr. Slack took a timely appeal from the judgment of conviction and the Nevada Supreme Court dismissed the appeal on its merits on December 20, 1993. Thereafter, Slack pursued the state court remedies of a post conviction petition for a writ of habeas corpus (and appeal therefrom).

Slack initiated the instant litigation in proper person. Following appointment of the Federal Public Defender and the filing of an amended petition, respondent has moved to dismiss, arguing lack of exhaustion with regard to certain claims and abuse of the writ with regard to the instant petition. Slack opposes that motion.

II. ARGUMENT

A. THE CLAIMS ARE EXHAUSTED

Respondent has argued that certain of Slack's grounds for relief, or portions of those grounds, consist of claims that are not exhausted. Respondent argues each of these specific claims were not raised in their identical form in the state court and respondent accordingly concludes that Slack has not exhausted his state remedies. Moreover, respondent implies that there is an available state remedy which Slack has purposefully bypassed. As set forth below and in Slack's statement of exhaustion contained in his amended petition, Slack has fairly presented the substance of all of his claims (except Grounds Two and Four (C), to which he contends the doctrine of futility applies) to the state courts and he has, accordingly, exhausted his state remedies.

1. The legal bases for petitioner's position.

A federal court will not grant a state prisoner's petition for relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). As a general matter, state remedies have not been exhausted unless the claim has been fairly presented to the state courts and the highest state court has disposed of the claim on the merits. *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). Although a state prisoner seeking federal habeas relief must first exhaust the remedies available in the courts of the State. *"It is the legal issues that are to be exhausted, not the petitioner." Burkett v. Cunningham*, 826 F.2d 1208, 1218

(3d Cir. 1987) (emphasis added) (quoting *U.S. ex rel. Geisler v. Walters*, 510 F.2d 887, 893 (3d Cir. 1975)). In the instant case, Slack has raised *every claim* in state court and has pursued *every possible remedy;* respondent's arguments in each case relate to the technical specifics concerning underlying facts or legal theories.

The exhaustion requirement stems from the doctrine of comity which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Carter v. Estelle*, 677 F.2d 427, 441 (5th Cir. 1982), *reh'g denied* 691 F.2d 777, *cert. denied* 460 U.S. 1056, 103 S.Ct. 1508 (1983) (citing *Darr v. Burford*, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed. 761 (1950)). Thus, exhaustion requires only that the petitioner fairly present his federal claims to the state's highest court "either on direct review of the conviction or in a post-conviction attack" before a federal court may consider those claims. *Id.* at 443 (citations omitted).

The Court in *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056, *reh'g denied* 490 U.S. 1076, 109 S.Ct. 2091 (1989) expressly made clear that, where further state proceedings are unavailable or would be useless, the exhaustion requirement is excused. *Castille*, 489 U.S. at 351; accord *Carter*, 691 F.2d at 445 ("[i]f state procedures do not provide a bona fide forum for a petitioner's constitutional claims or merely delay and hinder ultimate resolution, the foundations upon which exhaustion doctrine rests are dissolved"). "Thus, in determining whether a remedy for a particular constitutional claim is 'available,' the federal

courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim." *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 1046, 103 L.2d.2d 308 (1989) (O'Connor, J. concurring, joined by The Chief Justice, and Scalia, J.) *"The word "available"* as used in 28 U.S.C. § 2254(b) (requiring a petitioner first to exhaust available remedies in state court unless there exists an absence of corrective processes or 'circumstances rendering such processes ineffective to protect the rights of the prisoner') *does not refer to an avenue that exists on a map but is closed permanently to the kind of vehicle being driven by the defendant. It does not include a door that has been forever sealed."* *Russell v. Rolfs*, 893 F.2d 1033, 1037-38 (9th Cir. 1989) (emphasis added). Although respondents contend that Slack has not exhausted his claims, they have failed to identify the available state remedies that would permit him to do so.

Further, a habeas petitioner may *reformulate* claims already raised in state court; the test for exhaustion is whether the substance of the federal claim has been fairly presented to the state court. *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986) (citing *Picard v. Connor*, 404 U.S. 270, 278 (1971)). Allegations which merely lend specificity to claims do not materially alter the claim. *See Vasquez v Hillery*, 474 U.S. 254, 260 (1986) (supplementation of record did not circumvent exhaustion requirement where evidence did not fundamentally alter legal claim already considered by state courts). *See e.g. Rust v. Hopkins*, 984 F.2d 1486, 1491 (8th Cir.), *cert. denied*, 113 S.Ct. 2950 (1993) (petitioner fairly presented claim to state court by referring to due process and citing state cases employing

constitutional analysis). Supplement[ation] and clarif[ication]" of the state court factual record do not necessarily change a claim so dramatically as to require that the state courts be given a new opportunity to hear the issues. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). Under *Vasquez* and its progeny, the petitioner may supplement and clarify the record with, inter alia, presentation of additional instances of the same alleged violation. *See e.g. Willis v. Newsome*, 771 F.2d 1445, 1449 n.5 (11th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986) (failure to mention one alleged example of counsel's ineffective assistance); *Miller v. Estelle*, 677 F.2d 1080, 1083-84 (5th Cir. 1982) (exhaustion found because "incidents left out differed only in number, not in kind").

For purposes of assessing whether a claim has merely been *reformulated* in federal court, the controlling standard is that the petitioner exhausts the factual basis of the claim as long as he did not "fundamentally alter the legal claim already considered by the state courts" or "attempt[ ] to expedite federal review by deliberately withholding essential facts from the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). Moreover, liberal construction of pro se pleadings is appropriate. *See e.g. Picard v. Connor*, 404 U.S. 270, 278 (1971); *Miller v. Rowland*, 999 F.2d 389, 391 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1378 (1994) (pro se petitioner's state court claim that denial of work credits violated due process liberally construed as "substantial equivalent" of federal court claim of violation of contract clause); *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231-33 (3d Cir. 1992) (*cert. dismissed*, 113 S.Ct. 1071 (1993) (insufficiency of evidence claim, even if framed in state law rather than federal constitutional

terms, "necessarily implicates federal due process rights"); *Watson v. Dugger*, 945 F.2d 367, 372 (11th Cir. 1991) ("When a federal habeas petitioner presents what amounts to 'a mere variation in the same claim rather than a different legal theory,' . . . he has presented the state courts with the substance of his claims and thus has properly exhausted them.")

Assessment of exhaustion focuses on whether petitioner actually afforded the state courts the opportunity to rule on the claim and not on whether the state courts actually availed themselves of that opportunity. Thus, a claim presented will be deemed to be exhausted even if the state court did not address the claim on the merits and instead rejected it on a procedural ground. *See e.g. Sweet v. Cupp*, 640 F.2d 233, 237-238 (9th Cir. 1981). *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1720 (1992) ("[T]he petitioner [must] afford the State a full and fair opportunity to address and resolve the claim on the merits."); *Manning v. Alexander*, 912 F.2d 878, 881-83 (6th Cir. 1990) (notwithstanding state courts' ruling that petitioner "improperly raised his claim under . . . [state] procedural laws," petitioner held to have complied with federal exhaustion requirement by giving state courts "a full and fair opportunity to consider the claims."); *Wallace v. Duckworth*, 778 F.2d 1215, 1223 (7th Cir. 1985) (although petitioner did not present argument to state court in procedurally correct manner, court was given opportunity to decide issues, which is all that is required to satisfy exhaustion requirement). *See also Smith v. Digmon*, 434 U.S. 332, 333-334, 98 S.Ct. 257, 258 (1978) (exhaustion requires only that the state court be given the opportunity to consider the claims that have been presented).

If the petitioner has pursued the appropriate state court remedies, the only question that remains for purposes of exhaustion is whether the petitioner presented the federal claim in a manner that adequately apprised the state courts of the claim and gave them "an opportunity to apply controlling legal principles to the facts bearing upon [the] constitutional claim." *Picard v. Connor*, 404 U.S. 270, 277 (1971). The basic rule is that petitioner must "present the substance of his claim to the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986). *See also Anderson v. Harless*, 459 U.S. 4, 6 (1982) (petitioner must 'fairly present[ ]' to the state court the 'substance' of his federal habeas corpus claim."); *Humphrey v. Cady*, 405 U.S. 504, 516 n.18 (1972) ("question . . . is whether any of petitioner's claims is so clearly distinct from the claim he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim.").

Further, respondent must not be allowed to extrapolate Slack's claims to the point of requiring that the federal petition be identical to the prior state petitions. *See Engle v. Isaac*, 456 U.S. 107, 123-124 n.25 (1982) ("a creative appellate judge could almost always distill an unexhausted due process claim . . . [W]e are reluctant to interpolate an unexhausted claim not directly presented by the petition. *Rose v. Lundy* does not compel such harsh treatment of habeas petitions."). Thus, although respondent has attempted to "mix" Slack's petition, *see Lacey v. Cabriel*, 732 F.2d 7, 11-12 (1st Cir.) ("district court [could not] 'mix' Lacy's petition for him"), *cert. denied*, 469 U.S.

861 (1984), the rule requiring liberal construction of prisoners' pleadings should not be applied to Slack's disadvantage.

Slack contends that the Nevada Supreme Court was *aware* of the issues Slack perceived as important and it had *jurisdiction* over them. That Slack's appellate counsel gave the appearance of conceding two of the four issues at oral argument and failed to raise other issues is merely the basis for a claim of ineffective assistance of appellate counsel. That the issues were not the subject of trial objections or were otherwise ill-preserved for appeal is merely the basis for a claim of ineffective assistance of trial counsel. As set forth in Slack's statement of exhaustion claims of ineffective assistance of counsel (trial and appellate) are obviously inappropriate for substantive redress on direct appeal.

2. Respondent's specific complaints

a. Ground Two. Ground Two, as pleaded in Slack's petition, is a denial of due process claim. It is based on the claim that the charging document did not properly plead each element of first degree murder. The information did not place petitioner on notice that the state was required to show that the alleged homicide was committed with premeditation and deliberation. Petitioner has not previously litigated Ground Two in state court. The state supreme court has in the past several years declared its refusal to address this issue, the doctrine of futility excuses any failure to raise this issue. See 28 U.S.C. § 2254 (b) (prior to April, 1996 amendment). It

can be fairly said that Nevada courts would refuse to hear this claim. The claim is then exhausted.

b. Ground Three

Ground three of the amended petition challenges the constitutionality of the use of evidence of sexual misconduct designed to prejudice the jury. Here, respondent argues that ground three is unexhausted because the claim was not presented as a violation of Slack's Fifth and Fourteenth Amendments. That Slack's right to due process is impinged by this violation of his right to a fair trial cannot come as surprise to the state. It is clear that the *analysis* employed at the appellate level inherently implicated due process and fair trial claims. The "unexhausted claims" upon which respondent relies cannot reasonably be said to have fundamentally altered the legal claim of prosecutorial misconduct or to reflect an attempt by petitioner to withhold facts or legal theory from the state courts. Petitioner's attempts to state as many specifics as possible underlying his claim of prosecutorial misconduct can hardly be said under the circumstances to have caused the claim to become unexhausted.

Moreover, the exhaustion doctrine does not require that a federal habeas corpus petitioner frame a claim in precisely the same manner in which it was set forth in the state court pleadings. *See Williams v. Holbrook*, 691 F.2d 3, 6 (1st Cir. 1982) (petitioner "not precluded from some reformulation of the claims . . . made in the state courts"). Respondent must not be allowed to extrapolate Slack's claims to the point of requiring that the federal petition be identical to the prior state petitions. *See Engle v. Isacc*,

456 U.S. 107, 123-124 n.25 (1982) ("a creative appellate judge could almost always distill an unexhausted due process claim . . . [W]e are reluctant to interpolate an unexhausted claim not directly presented by the petition. *Rose v. Lundy* does not compel such harsh treatment of habeas petitions.") Thus, although respondent has attempted to "mix" Slack's petition, *see Lacey v. Gabriel*, 732 F.2d 7, 11-12 (1st Cir.) ("district court [could not] 'mix] Lacy's petition for him."), *cert. denied*, 469 U.S. 861 (1984), the rule requiring liberal construction of prisoners' pleadings should not be applied to Slack's disadvantage.

c. Grounds Five and Six. These Grounds for relief allege ineffective assistance of trial and appellate counsel, respectively. Here, respondent alleges that the majority of ground five is unexhausted and Ground six is unexhausted in its entirety. Respondent's complaints in this regard go to additional *facts* pertaining to counsel's alleged errors and omissions. Notably, these *legal* errors underlying these alleged omissions are not alleged to be mentioned now for the first time.

It suffices that the substantial equivalent of a petitioner's federal habeas claim has been argued in the state proceedings." *Spiegel v. Sandstrom*, 637 F.2d 405, 407 (5th Cir. 1981). *Accord, e.g., Vasquez v. Hillery*, 474 U.S. at 260 ("supplemental evidence did not fundamentally alter the claim considered by the state courts"). In the instant case, Slack has been raising complaints pertaining to his claim of ineffective assistance of counsel at every possible opportunity. He raised the substance of this claim during an entire round of post-conviction proceedings. His increased specificity and specifications of prejudice are

not additional unexhausted claims. *See Vasquez v. Hillery*, ("supplement[ation] and clarif[ication]" of the state court factual record do not necessarily change a claim so dramatically as to require the state courts be given a new opportunity to hear the issues."). Under *Vasquez* and related decisions, the petitioner may supplement and clarify the record to include more sophisticated analyses and introduction of additional factual support. Slack has not "fundamentally alter[ed] the legal claim[s] already considered by the state courts"; accordingly, the claims are exhausted.

B. PETITIONER HAS NOT ABUSED THE WRIT

The amended petition does not violate Rule 9 of the rules governing § 2254 cases and does not constitute abuse of the writ. In *Farmer v. Angelone*, 98 F.3d 1548 (9th Cir 1996), the Ninth Circuit held that Rule 9(b) recognizes two types of abuse of the writ. One type of abuse occurs when a new petition – raising either new claims or claims previously raised – is filed after a previous petition has been addressed on the merits. This type of abuse may conveniently be termed *McCleskey* abuse: the Supreme Court, in *McCleskey v. Zant*, 499 U.S. 467 (1991), imposed the rule that a prima facie case of abuse of the writ was established as a matter of law when a new petition was filed after a previous petition had been adjudicated on the merits, and that, when those facts were pleaded, the burden shifted to the petitioner to establish an exception – cause and prejudice or a miscarriage of justice – to the abuse doctrine. *Id.* at 477.

The Supreme Court relied upon the costs associated with a second reexamination of the validity of a state conviction by a federal court, after a claim has been "defaulted in the first round of federal habeas," *McCleskey*, 499 U.S. at 490-492, 498, in imposing the stringent rules that actual knowledge of a claim at the time of the first petition is not necessary to a finding of default, when there has been a prior proceeding on the merits.

The second type of abuse may arise under the circumstances suggested by *Sanders v. United States* (upon which Rule 9(b) is based), and by former 28 U.S.C. § 2244(b). This type of abuse requires a showing that a new claim in a petition was "deliberately withheld" from a previous petition, former 28 U.S.C. § 2244(b); *Sanders*, 373 U.S. at 18, or that the petitioner "deliberately abandon[ed]" the claim in a hearing on a previous petition, *id.*, citing *Wong Doo v. United States*, 265 U.S. 239, 241 (1924); or that the "only purpose" of the petition is "to vex, harass or delay," *Sanders*, 373 U.S. at 18; or that the petitioner is deliberately engaging in needless piecemeal litigation. *Sanders*, 373 U.S. at 18.

The *Farmer* decision explicitly acknowledged the continuing validity of these standards for non-*McCleskey* abuse:

> "A federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner (1) made a conscious decision deliberately to withhold them from a prior petition, (2) is pursuing needless piecemeal litigation, or (3) has raised the claims only to vex, harass, or delay. Where there is no affirmative indication in the record that the petitioner made a conscious decision deliberately to withhold his claim, proceed by piecemeal litigation, to vex or harass or annoy the court or the state, a second petition raising a new claim is not an abuse of the writ.
>
> The state has presented no evidence that any of the factors outlined in *Sanders* are present. Moreover, there is nothing in the history of this case to indicate that Hamilton deliberately withheld his claim in the hope of being granted two hearings instead of one."

Farmer, 98 F.3d at 1559, *quoting Hamilton v. Vasquez*, 882 F.2d 1469, 1473 (9th Cir. 1989) (citations omitted).

This analysis of *Sanders* abuse is the only one that fits into the text and structure of the applicable statutes and rules. The *Farmer* decision emphasized the language of Rule 9(b) in concluding that abuse of the writ could be found, even if no prior proceeding on the merits of a previous petition had been conducted, relying on the language "[a] second or successive petition may be dismissed . . . if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." *Farmer*, 98 F.3d at 1555. The Advisory Committee Notes (1976) to Rule 9(b), quoted in *Farmer*, explicitly adopt the *Sanders* analysis on the standard of abuse under this theory:

> With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:

> In either case, full consideration of the merits of the new application can be avoided [only] if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.
>
> 373 U.S. at 17-18 [83 S.Ct. at 1078]

Farmer, 98 F.3d at 1555-1556. The Notes conclude that Rule 9(b) will not "eliminate a remedy to which the petitioner is rightfully entitled," and emphasize the language of *Sanders* holding that:

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.
>
> 373 U.S. at 19 [83 S.Ct. at 1078].

Farmer, 98 F.3d at 1556.

Thus the non-*McCleskey* prong of Rule 9(b) incorporates the *Sanders* standards of abuse, as the Advisory Committee Notes clearly indicate. This conclusion is also the only one consistent with the settled principle of statutory construction that an enactment which employees a term of art (like "abuse of the writ") has been judicially defined is presumed to have incorporated the judicial interpretation of the term. *E.g., McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989).

Abuse of the writ is a defense which must be pleaded and proved by the state. *McCleskey*, 499 U.S. at 477; *United States v. Kleinbart*, 27 F.3d 586, 593 n.5 (D.C. Cir.), *cert. denied* 115 S.Ct. 456 (1994); *see, Farmer*, 98 F.3d at 1559. As with any other affirmative defense, the facts establishing the defense must be pleaded with specificity. Fed. R. Civ. P., Rules 8(b, c), 8(e)(I), 12(b); *see, e.g., Heller Financial, Inc. v. Midwhey Power Co., Inc.*, 883 F.2d 1286, 1294-1295 (7th Cir. 1989) (rules of pleading require " 'short and plain statement' of the defense [citation]," and "bare bones conclusory allegations" of legal conclusions insufficient).

In the case of *McCleskey* abuse, the requirement of specifically pleading the facts supporting the defense is simply met: all the state needs to allege is the petitioner's "writ history," *McCleskey*, 499 U.S. at 494; and if there has been an adjudication on the merits of a previous petition, the current petition (whether it raises the same claims or new claims) is abusive as a matter of law and the burden shifts to the petitioner to allege that the abuse is excused.

Non-*McCleskey* abuse, however, presents quite a different pleading situation. Unlike *McCleskey* abuse, there can be no easy recitation of a prior adjudication on the merits to establish abuse as a matter of law. Rather, the substantive standard of *Sanders* abuse requires a showing that the petitioner deliberately withheld a claim in previous litigation, or that the petitioner is engaging in a pattern of needless piecemeal litigation, or is filing the petition solely to "vex, harass, or delay" the opposing

party. *See Hamilton v. Vasquez, supra,* 882 F.2d at 1473. This pleading burden is not onerous where actual abuse exists.

For instance, in *McCleskey* itself, the petitioner had raised a claim in state collateral proceedings, thus clearly indicating the fact that the claim was known to the petitioner. In his first federal petition, petitioner did not raise that claim, but after the first petition was adjudicated he tried to raise it in a second petition. *McCleskey,* 499 U.S. at 475-476. Under the *Farmer* analysis, those facts could be alleged as showing abuse by the deliberate withholding of the claim and needless piecemeal litigation: if the claim was unexhausted when it was introduced in the new petition, and it had been deliberately withheld in a first petition that was dismissed for exhaustion in order to induce a second round of exhaustion, an inference could arise that abuse was shown. *See also Wong Doo v. United States,* 265 U.S. at 240-241 (claim raised but not litigated in first federal petition raised in second federal petition); *cf. Price v. Johnson,* 334 U.S. 266, 291-292 (1948) (no abuse where petitioner ignorant of facts supporting claim or unaware of legal significance of relevant facts). Similarly, if the only unexhausted claims included in a petition are patently frivolous, the state could allege that an inference should arise that the purpose of including the unexhausted claims in the petition was solely to "mix" the petition and to induce the necessity of exhaustion proceedings. Thus the state could properly allege that the sole purpose of asserting the claims was "to vex or harass or annoy the court or the state," *Farmer,* 98 F.3d at 1559, *quoting Hamilton v. Vasquez,* 882 F.2d at 1473, and thus that abusive conduct was shown.

By contrast, pleading simply the fact that a habeas corpus petition contains a new claim which was not raised in a previous petition which was dismissed "without prejudice" and was not adjudicated on the merits does not in any way establish that the petitioner was acting with an improper purpose, by deliberately withholding the claim in the previous proceeding, nor does it otherwise suggest the existence of a subjective intent to "vex, harass, or delay." *See Hamilton v. Vasquez,* supra, 882 F.2d at 1473. To the contrary, the addition of new claims as the result of the current federal proceedings will normally occur because that is first proceeding in which they have been recognized.

The Respondent's contention that the petitioner has abused the writ is unavailing. The respondent has incorrectly characterized the appropriate standard for abuse of the writ.

III. CONCLUSION

Slack's petition presents neither unexhausted claims nor does it constitute an abuse of the writ. Respondent's motion to dismiss should be denied and respondents should be ordered to answer the petition.

Respectfully submitted,

/s/ Deborah A. Trevino
DEBORAH A. TREVINO
Assistant Federal
Public Defender

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO SLACK Petitioner, -vs- E.K. McDANIEL, et al., Respondents.	)	CV-N-95-194-DWH

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on February 23, 1998, she served a copy of the above and foregoing *Opposition to Motion to Dismiss Petitioner for Writ of Habeas Corpus Pursuant to U.S.C. § 2254 by a Person in State Custody,* by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh
Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, NV 89701-4717

Antonio Slack
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Ely State Prison
P.O. Box 1989
Ely, NV 89301

/s/ Pamela M. Ramage

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Attorneys for Respondents.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. E. K. MC DANIEL, Warden, et. al., Respondents.	)	Case No. CV-N-95-194-DWH **REPLY TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY**

COMES NOW, Respondents, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and hereby replies to Petitioner's "Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 by a Person in State Custody." This reply is made and based on the points and authorities attached hereto as well as all of the documents and pleadings on file herein.

POINTS AND AUTHORITIES

I. ARGUMENT

A. THE INSTANT PETITION CONTAINS UNEXHAUSTED GROUNDS AND SHOULD BE DISMISSED.

In his opposition Petitioner ANTONIO SLACK (hereinafter SLACK) sets forth several arguments in support of his contention that his claims are exhausted. None of SLACK's claims have any merit.

As to his claim in ground two, that the open murder charge did not place him on notice that the state was required to prove premeditation, SLACK concedes he has never presented this claim in state court. However, SLACK argues the doctrine of futility applies because the Nevada Supreme Court has, in the past several years, declared its refusal to address this issue. First of all SLACK does not point to any authority which supports his conclusory allegation that the Nevada Supreme Court has refused to address this issue. Respondents are unaware of any such "declaration" by the Nevada Supreme Court. Respondents submit that the fact that SLACK does not cite any Nevada case in which such a "declaration" is made supports their position that the Nevada Supreme Court has never declared its refusal to address this issue.

Further, the futility doctrine has been discredited. Under the futility doctrine the exhaustion requirement was excused when a state's highest court has "recently addressed the issue raised in the petition and had resolved it adversely to the petitioner." *Sweet v. Cupp*, 640

F.2d 233, 236 (9th Cir. 1981). However, the futility doctrine was short lived.

The United States Supreme Court has criticized futility as excusing the exhaustion requirement. The Supreme Court has stated:

> If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.

Engle v. Isaac, 456 U.S. 107, 130, 102 S.Ct. 1558, 1573, 71 L.Ed.2d 783, 802 (1982).

Since *Engle*, the Ninth Circuit, while not expressly overruling *Sweet*, has rejected the futility doctrine in at least one case. *See Roberts v. Arave*, 847 F.2d 528, 530 (9th Cir. 1988). As SLACK himself has conceded he has never even attempted to present his claim in ground two to the Nevada Supreme Court. Ground two, of the instant petition is unexhausted.

As to ground three, SLACK contends that "the analysis employed at the appellate level inherently implicated due process and fair trial claims. The "unexhausted claims" upon which respondent relies cannot reasonably be said to have fundamentally altered the legal claim of prosecutorial misconduct or to reflect an attempt by petitioner to withhold facts or legal theory from the state

courts." (Opposition, pg. 11.) What legal claim of prosecutorial misconduct? SLACK has not raised a claim of prosecutorial misconduct in his third amended petition.

SLACK is attempting to argue the "essentially the same" standard as set forth in *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986). However, *Tamapua* is no longer viable in light of *Duncan*. *Keating v. Hood*, 133 F.3d 1240, 1241 (9th Cir. 1998) ("We have repudiated *Tamapua* on the basis of *Duncan*.") SLACK has not presented his federal constitutional claims set forth in ground three to the Nevada courts. Ground three is unexhausted.

As for his claims in grounds five and six, SLACK argues that Respondents argument goes only to additional facts pertaining to his counsel's errors rather than the legal claim of ineffective assistance of trial and appellate counsel. SLACK's argument totally ignores the fact that exhaustion requires that the same facts *and* legal theories be presented in state court. *See Picard v. Connor*, 404 U.S. 270, 277-78 (1971). SLACK's factual allegations in ground five, subsections (B) through (E) and in ground six have never been presented to the Nevada courts. These claims are unexhausted. SLACK's third amended petition contains unexhausted claims and should be dismissed.

B. SLACK'S THIRD AMENDED PETITION CONSTITUTES AN ABUSE OF THE WRIT.

In his opposition, SLACK argues that Rule 9(b) of the Rules Governing Section 2254 Cases recognizes two types of abuse of the writ. According to SLACK, abuse occurs when a petitioner files a new petition, following the adjudication of a former petition on the merits, which

does not raise new claims. SLACK has elected to refer to this type of abuse as *McCleskey* abuse. The second type of abuse under 9(b), according to SLACK, requires a showing that a new claim was deliberately withheld from a previous petition, or that the petitioner deliberately abandoned his claim, or that the only purpose of the petition is to vex, harass, or delay, or that the petitioner is deliberately engaging in needless, piecemeal litigation. (Opposition, pg. 14.)

According to SLACK his two types of abuse have two different standards. According to Slack, with the so called *McCleskey* abuse, the burden is on the petitioner to show cause and prejudice to overcome the abuse. SLACK then alleges that with the second type of abuse, the type alleged in this case, the burden is on the Respondents to prove that he deliberately withheld a claim in previous litigation, or that the petitioner is engaging in a pattern of needless piecemeal litigation, or is filing the petition solely to vex, harass or delay the opposing party. SLACK is simply wrong.

Abuse of the writ occurs when there is a successive petition which does not raise new claims and the former petition was adjudicated on the merits or when the successive petition does raise new claims and the failure of the petitioner to raise those claims previously constitutes abuse. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Court foll. 28 U.S.C. §2254; *See also Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1474 (1997).

There are several ways in which a petitioner can abuse the writ. However, there is only one standard

which can excuse abuse of the writ, no matter what conduct by the petitioner is at issue. In *McCleskey v. Zant*, 111 S.Ct. 1454 (1991), the United States Supreme Court defined the abuse of the writ doctrine as follows:

> The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding. The terms "abuse of the writ" and "inexcusable neglect," on the one hand, and "procedural default," on the other, imply a background norm of procedural regularity binding on the petitioner. This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas. A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion. . . . In habeas, equity recognizes that a "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." . . . For these reasons, both the abuse-of-the-writ doctrine and our procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.

Id. at 1468 (citations omitted).

The Supreme Court went on to say:

> The cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse-of-the-writ inquiry in the following manner. When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. *The burden to disprove abuse then becomes petitioner's.* To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. (emphasis added.)

Id. at 1470.

SLACK argues that his second type of abuse arises under *Sanders v. United States*, 83 S.Ct. 1068 (1963). However, *Sanders* did not create a separate type of abuse, it merely gave an example of conduct constituting abuse. The Supreme Court in *McCleskey* discussed *Sanders* stating:

> Although our decisions on the subject do not all admit of ready synthesis, one point emerges with clarity: Abuse of the writ is not confined to instances of deliberate abandonment. *Sanders* mentioned deliberate abandonment as but one example of conduct that disentitled a petitioner to relief.

McCleskey at 1467.

Sanders did not create a separate type of abuse of the writ, it simply discussed one example of a petitioner's conduct which would constitute abuse of the writ. There is only one standard which can excuse an abuse of the writ. Respondents have the burden of pleading abuse of

the writ. This is accomplished by noting SLACK's prior writ history, identifying the claims he has raised for the first time and alleging that he has abused the writ. *McCleskey* at 1470. Respondents have done so in their motion to dismiss. The burden to disprove abuse has now shifted to SLACK. *McCleskey*, at 1470. See also *Farmer*, supra.

SLACK must demonstrate cause and prejudice for failing to raise grounds two, four (C), five, six and seven in his prior federal petition. SLACK has not even attempted to demonstrate cause and prejudice in his response to Respondents' motion to dismiss. SLACK's third amended petition constitutes an abuse of the writ and should be denied.

II.

CONCLUSION

Based on the foregoing, Respondents respectfully request this Court issue an order dismissing SLACK's third amended petition.

RESPECTFULLY SUBMITTED this 6th day of March, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Julie A. Slabaugh
JULIE A. SLABAUGH
Deputy Attorney General
Criminal Justice Division

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 6th day of March, 1998, I served a copy of the foregoing REPLY TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY by mailing a true copy to the following:

DEBORAH A. TREVINO
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101

/s/ Illegible

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. E.K. McDANIEL, *et al.*, Respondents.	)	Case No. CV-N-95-194-DWH MEMORANDUM DECISION AND ORDER

Petitioner Antonio T. Slack has submitted a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 attacking the validity of his conviction. Slack asserts seven grounds for relief: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct the jury; (5) he was denied effective assistance of counsel; (6) he was denied effective assistance of appellate counsel; and (7) cumulative error.

Slack previously filed a petition for writ of habeas corpus, case number CV-N-91-561-HDM, in which he alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation instruction. *See Slack v. Director of Nevada*

State Prisons, CV-N-91-561-HDM. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all State remedies.

Respondents have moved to dismiss the instant petition alleging abuse of the writ (#67). Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides that:

> A second or successive petition may be dismissed . . . if new and different grounds are alleged [and] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In the instant petition, grounds two, four (C), five, six and seven were not raised in Slack's previous petition. Therefore, the issue before the court is whether Slack's failure to assert the new ground in his first petition constitutes an abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. To meet their burden, the state must with clarity and particularity note the prior writ history, identify the claims that appear for the first time in the current petition, and allege that petitioner has abused the writ. If the state meets their burden, then petitioner must show (1) cause for not raising the claim the previous petition, e.g., that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim, and (2) actual prejudice resulting from the errors about which he complains. *Bonin v. Calderon*, 77 F.3d 1155, 1158-59 (9th Cir. 1996); *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996).

"Abuse of the writ doctrine examines *petitioner's* conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition. . . . " *McClesky*, 499 U.S. at 498. An inmate's pro se status does not constitute "an objective external factor" which excuses a petitioner's failure to raise his new claim in prior habeas petitions. *Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir.1992); *Hughes v. Idaho State Board*, 800 F.2d 905, 909 (9th Cir.1986). An inmate's pro se status does not excuse an inmate's ignorance of the law nor establish cause for the purpose of determining whether an inmate abused the writ by failing to raise new claims in prior habeas petitions: there is no constitutional right to counsel in post-conviction proceedings. *Saahir*, 956 F.2d at 118. To show actual prejudice, "petitioner bears 'the burden of showing

not merely that the errors at his trial constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension.' " *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (*quoting United States v. Frady*, 456 U.S. 152, 170 (1982)).

As an alternative to showing "cause and prejudice," Slack may attempt to show that dismissal of his instant claim on abuse of the writ grounds will result in a "fundamental miscarriage of justice." Such a showing, however, is very difficult to make. It requires Slack to demonstrate that he is "actually innocent" of the crime with which he was convicted. *See also Smith v. Murray*, 477 U.S. 527, 537 (1986).

Respondents have met their burden in alleging that Slack has abused the writ. Slack must now establish cause and prejudice for his failure to assert the instant claim in his first petition or he must demonstrate that a fundamental miscarriage of justice will result if the court dismisses the case for abuse of the writ. Given the extreme difficulty of showing a "fundamentally unjust incarceration," this court recommends Slack disregard this alternative test and attempt to show cause and prejudice.

IT IS ORDERED that Slack shall have fifteen (15) days from the date of this order within which to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four (C), five, six and seven of the instant amended habeas petition. No extensions of time will be granted.

Dated this 10th day of March, 1998.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

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DEBORAH A. TREVIÑO
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Attorney for Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, vs. DIRECTOR, NDOP, et al., Respondents.	CV-N-95-194-DWH **MOTION FOR RECONSIDERATION OF MEMORANDUM DECISION AND ORDER ENTERED ON MARCH 11, 1998** (Filed Mar. 26, 1998)

Petitioner, Antonio Slack, by and through his counsel of record, Franny A. Forsman, Federal Public Defender, Deborah A. Trevino, Assistant Federal Defender, respectfully moves this court to reconsider, alter and amend its Memorandum Decision and Order entered March 11, 1998. This motion is made pursuant to Rule 59 of the Federal Rules of Civil Procedure and is based upon the attached memorandum of points and authorities and the entire file in this matter. Petitioner respectfully requests a hearing in this matter. Undersigned counsel anticipates approximately thirty minutes for oral argument.

DATED this 25th day of March, 1998.

Respectfully Submitted,

/s/ Deborah a. Treviño
DEBORAH A. TREVIÑO
Asst. Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The court has entered an order determining that Respondents have met their burden in alleging that petitioner has abused the writ with regard to grounds two, four(C), five and seven of the instant amended petition. On the basis of this determination, the court has ordered petitioner to file points and authorities addressing whether he can overcome the abuse of the writ bar. This motion for reconsideration follows. The court's order is premised upon an error of law which requires correction and reconsideration.

A. The state has not alleged facts sufficient to establish that an abuse of the writ has occurred.

The state argues that Rule 9(b) of the Rules Governing Section 2254 cases requires that the grounds asserted in the amended petition which are unexhausted or were not included in the previous federal petitions should be dismissed under the abuse of the writ doctrine. The state's pleading does not furnish any ground for dismissing any part of the amended petition.

B. The amended petition is not a "second or successive" one under Rule 9(b).

Initially, in order to preserve the question for review, petitioner submits that Rule 9(b) does not apply to his case at all, because the amended petition before the court is not a "second or successive" one within the meaning of the rule, since the previous federal petition was dismissed without prejudice for exhaustion. Petitioner recognizes that the Court of Appeals has adopted a contrary position. *Farmer v. McDaniel,* 98 F.3d at 1556-1557. Every other Court of Appeals that has addressed this issue, however, has held that a petition is not subject to Rule 9(b) as a "second or successive" one if previous petitions have been dismissed without prejudice for exhaustion. *McWilliams v. State of Colorado,* 121 F.3d 573, 575 (10th Cir. 1997); *Benton v. Washington,* 106 F.3d 162, 164 (7th Cir. 1996); *Camarano v. Irvin,* 98 F.3d 44, 46-47 (3d Cir. 1996); *In re Gasery,* 116 F.3d 1051, 1052 (5th Cir. 1997); *Woods v. Whitley,* 933 F.2d 321, 322 (5th Cir. 1991); *Jones v. Estelle,* 722 F.2d 159, 168 (5th Cir. 1983) (en banc) *cert. denied,* 466 U.S. 976 (1984); *Dickson v. Maine,* 101 F.3d 791, 791 (1st Cir. 1996) (per curiam).

C. The A.E.D.P.A. has superseded Rule 9(b) of the Rules governing § 2254 cases.

This case is governed by the A.E.D.P.A. because it was commenced after April 25, 1996. In *Farmer* the Ninth Circuit held that Rule 9(b) applies, in limited part, to §2254 actions that had previously been dismissed without prejudice. The A.E.D.P.A. provides that a successor petition cannot be filed with the district court unless a panel

of the Court of Appeals authorizes such an action. 28 U.S.C. §2244(b)(3). In a case following the enactment of the A.E.D.P.A. the Ninth Circuit held that previous petitions which have been dismissed without prejudice on exhaustion grounds do not trigger §2244(b)(3). *In re Turner,* 101 F.3d 1323 (9th Cir. 1997). In other words, a dismissal without prejudice does not make the next §2254 action a successor petition.

The Court of Appeals for this circuit has created an intra-circuit conflict with *Farmer* by holding that a "second or successive" petition under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) – which uses the identical language in 28 U.S.C. §2244(b) that is used in, and was adopted from, Rule 9(b) – does not refer to a petition filed after a previous petition has been dismissed without prejudice for purposes of exhaustion. *In re Turner,* supra at p. 323. In order to preserve this issue for review, *see* Sup. Ct. Rule 10.1(a) (conflicting decisions of Court of Appeals as basis for review on certiorari); Fed. R. App. P., Rule 35(a)(1) (securing uniformity of decision as ground for hearing en banc); petitioner submits that no part of the instant amended petition can be subject to dismissal under Rule 9(b).

This position is also supported by the decision of the Court of Appeals in *Calderon v. United States District Court (Taylor),* ___ F.3d ___, 1998 WL 24138 (9th Cir. January 28, 1998), in which the court held that a district court has discretion to hold the exhausted part of a habeas petition in abeyance while dismissing the unexhausted claims for exhaustion. An amended petition, adding the claims following exhaustion, could not rationally be considered a "second or successive" one under Rule 9(b) because there

would be no difference in substance between that situation and the one presented here where the previous petition was dismissed without prejudice in its entirety.

The *Turner* decision makes the jurisprudence in this circuit on this issue fundamentally incoherent. It is clear that the AEDPA was intended to, and did, impose restrictions on the filing of "second or successive" habeas corpus petitions in 28 U.S.C. §2244(b) that are more stringent than the preexisting caselaw on abuse of the writ. *E.g., Felker v. Turpin,* ___ U.S. ___, 116 S.Ct. 2333, 2340 (1996); *cf. Schlup v. Delo,* 513 U.S. 298 (1995); *McCleskey v. Zant,* 499 U.S. 467 (1991). Under *Turner,* however, it does not matter how many previous federal petitions have been dismissed for exhaustion: a new petition under the AEDPA is not a "second or successive" one under 28 U.S.C. §2244(b). *Turner* and *Farmer* can be harmonized if this court concludes that the *Farmer* decision is limited to cases pre-dating the enactment of the A.E.D.P.A. A contrary conclusion ignores the holding in *Turner* a case more applicable to the instant action because it was controlled by the A.E.D.P.A.

D. There is no basis for finding abuse as a result of presentation of unexhausted claims.

As shown above, the amended petition before this court is fully exhausted. As a result, there is no basis for dismissal, with or without prejudice. The basis for the theory of abuse of the writ in the non-McCleskey context – that is, when there has been no "first round of federal

habeas," *McCleskey v. Zant*, 499 U.S. at 490 – is (as originally articulated by the state in this case) that the petitioner is attempting to evade resolution of his constitutional claims by repeatedly filing mixed petitions, thus avoiding a decision on the merits due to the necessity of dismissal for exhaustion. Petitioner here was not, and has not been, seeking to evade such a resolution. There is accordingly no basis for the state to seek dismissal either for exhaustion or on the basis of abuse.

Petitioner submits that a hearing on that issue is necessary before final resolution of any question involving petitioner's substantial rights.

II. CONCLUSION

For the reasons stated above and in petitioner's opposition to respondents motion to dismiss, petitioner respectfully requests that this Court alter or amend its Memorandum Decision and Order entered on March 11, 1998.

Dated this 25th day of March, 1998.

Respectfully submitted,

/s/ Deborah A. Treviño
Deborah A. Treviño
Assistant Federal Public Defender
Attorney for Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	)	CV-N-95-194-DWH

CERTIFICATE OF MAILING

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 25, 1998, she served a copy of the above and foregoing document by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701

Antonio T. Slack
#31395
Ely State Prison
P.O. Box 1989
Ely, NV 89301

/s/ Pamela M. Ramage
Pamela M. Ramage
Legal Assistant

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO A. SLACK, Petitioner, vs. E.K. McDANIEL, *et al.*, Respondents.	Case No. CV-N-95-194-DWH MEMORANDUM DECISION AND ORDER (Filed Mar. 30, 1998)

Petitioner Antonio A. Slack has filed an amended petition for habeas relief pursuant to 28 U.S.C. § 2254 (#65). Respondents move to dismiss claiming several grounds are unexhausted and abusive (#66). The Court ordered Slack to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four(C), and five, six and seven (#72). Slack has filed a motion for reconsideration of the court order (#73). For the reasons set forth below, the Court finds grounds two, four(C), five, six and seven are abusive and ground three is unexhausted. Therefore the petition must be dismissed.

BACKGROUND

In February 1990, a jury found Slack guilty of second degree murder with use of a deadly weapon. *See* #16, ex.12. Slack was sentenced to two consecutive life terms with the possibility of parole. *See* #16, ex.13. Slack filed a direct appeal with the Nevada Supreme Court which was dismissed. *See* #16, ex.22.

Slack then filed his first federal habeas petition with this court. *See* #16, ex.25. In his first habeas petition, Slack alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation instruction. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all state remedies. *See Slack v. Director of Nevada State Prisons,* CV-N-91-561-HDM.

In 1992, Slack filed a state habeas petition in the Eighth Judicial District Court of Nevada. *See* #16, ex.31. The district court denied the petition, *see* #16, ex. 37, and the Nevada Supreme Court dismissed Slack's appeal. *See* #16, ex.39.

In 1995, Slack filed his second federal habeas petition with this Court (#4). After the Court appointed counsel for Slack (#43), he filed an amended habeas petition (#64). In Slack's amended habeas petition he clams [sic]

he is entitled to relief because: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct the jury;[1] (5) he was denied effective assistance of counsel;[2] (6) he was denied effective assistance of appellate counsel;[3] and (7) cumulative error.

In their motion to dismiss, respondents argue grounds two, four(C), five, six and seven are abusive. Respondents also argue grounds two, three, four(C), five (B-E), six and seven are unexhausted. Slack was ordered

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[1] In ground four, Slack claims: (a) the reasonable doubt instruction was unconstitutional; (b) the premeditation and deliberation instruction was unconstitutional; and the malice aforethought instruction was unconstitutional.

[2] In ground five, Slack contends his trial counsel was ineffective when he: (a) failed to prevent the introduction of highly prejudicial evidence; (b) failed to object to reasonable doubt jury instruction; (c) failed to object to premeditation and deliberation jury instruction; (d) failed to object to malice aforethought jury instruction; and (e) failed to investigate the facts of case and develop available defenses.

[3] In ground six, Slack argues he was denied effective assistance of appellate counsel when: (a) appellate counsel failed to raise on direct appeal that Slack was denied his right the due process under the Fifth and Fourteenth Amendment when charged with open murder in an information which did not properly plead elements of first degree murder and that the malice aforethought instruction was unconstitutional; and (b) appellate counsel conceded two of the four issues raised on direct appeal.

to show cause and prejudice to overcome the abusive bar; however he filed a motion for reconsideration which the court will deny.

ABUSE OF THE WRIT

A second petition may be dismissed for abuse of the writ if new grounds are alleged and the failure to allege them in the previous petition was an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 1548, 1555 (9th Cir.1996). The previous petition need not have been dismissed on the merits. *See id.* at 1557. The instant petition therefore may be subject to dismissal for abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. The State met that burden here by noting Slack's previous writ history, identifying the grounds for relief that appear for the first time in the instant petition and alleging that Slack abused the writ. *See id.* The burden now is on Slack to disprove abuse of the writ by showing cause for failing to raise the new grounds for relief earlier and prejudice therefrom. *See id.* Slack does not meet his burden.

In reply to the court order instructing Slack to file points and authorities showing cause and prejudice to overcome the abuse of the writ bar, he filed a motion for reconsideration (#73). First the Court notes that Slack has incorrectly filed his motion for reconsideration pursuant to Fed.R.Civ.P.59. Under this rule a party may move for a new trial or an amendment of a judgment. Since there has not been a trial and a judgment has not been entered in this case, Slack cannot bring a motion pursuant to this

rule. Additionally even if Slack could bring motion under Fed.R.Civ.P.59, the motion must be brought within ten days after the entry of judgment. *See* Fed.R.Civ.P. 59(e). Slack's motion was untimely since it was filed two days after the ten day period expired. Nevertheless, the Court will address Slack's arguments in his motion for reconsideration.

In his motion for reconsideration, Slack claims the State has not established the habeas petition is abusive, the amended petition is not successive, and that the case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). As previously noted, the State has met its burden under *McClesky* [sic] by specifying which grounds for relief in the amended habeas petition are abusive. Next, the instant petition is Slack's second petition and thus successive. The Ninth Circuit has held that a judge may find a second petition is abusive when new grounds are alleged and a petitioner failed to allege them in the previous petition, even if the previous petition was dismissed for failing to exhaust state remedies. *See Farmer*, 98 F.3d at 1557. Lastly, Slack wrongly asserts the case is governed by the AEDPA because it was commenced after April 26, 1996. First, the instant case was commenced March 27, 1995. Second, the amendments to 28 U.S.C. §§ 2244(a) and 2255 resulting from the AEDPA are not retroactive. *See Lindh v. Murphy*, ___ U.S. ___, ___, 117 S.Ct. 2059, 2063 (1997). Accordingly, the AEDPA is not applicable to this case.

Thus, since Slack has failed to demonstrate cause and prejudice to overcome the abuse of the writ bar, the Court will dismiss grounds two, four(c), five, six and seven as abusive.

EXHAUSTION

Although respondents argue several grounds are unexhausted, the court will only address ground three since all other grounds will be dismissed as abusive. Title 28 U.S.C. § 2254(b) and (c) provide that a state prisoner must exhaust all available state court remedies before filing a petition for habeas corpus in federal court. The exhaustion of available state judicial remedies is ordinarily a prerequisite to obtaining federal habeas corpus relief. 28 U.S.C. § 2254(b) (1988); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). To demonstrate compliance with the exhaustion requirement, a habeas applicant must show that the claim included in the federal petition was "fairly presented" to the state's highest court, *Picard v. Connor*, 404 U.S. 270, 275 (1971), or demonstrate that no state remedy remains available. *Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1992). A claim has been "fairly presented" to the state court if the petitioner has described the operative facts and the legal theory upon which he bases his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Furthermore, a petitioner has described the operative facts and the legal theory upon which he bases his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Furthermore, a petitioner cannot merely allege exhaustion; the record must show that the petitioner sought review in the highest state court. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 1023 (1982). In addition, the habeas petitioner must exhaust his state remedies as to each of his federal claims. If a habeas corpus petition contains both exhausted and non-exhausted claims, the petition must be dismissed. *Rose*, 455 U.S. at 520.

In ground three, Slack claims his Fourteenth and Fifth Amendment right to due process was violated when the jury was prejudiced by evidence of sexual misconduct. Respondents contend the claim is unexhausted because although Slack presented the facts of this claim to the Nevada Supreme Court, he did not claim his Fourteenth and Fifth Amendment rights were violated. If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Johnson v. Zenon*, 88 F.3d 828, 830 (1996); *see also Ybarra v. Sumner*, 678 F.Supp. 1480, 1481 (D.Nev. 1988) (citing *Picard*, 404 U.S. at 276). In his opening brief to the Nevada Supreme Court on direct appeal, Slack never argued his Fifth or Fourteenth Amendment right to due process was violated when prejudicial evidence was presented to the jury. In his opening brief, Slack relied only upon state law to support his claim. *See* #16, ex.20, pp. 15-18. Thus, the Court finds ground three is unexhausted.

CONCLUSION

Since ground three of Slack's third amended habeas petition is unexhausted, this action will be dismissed to allow Slack the opportunity to present the unexhausted claim to the state court. If Slack wishes to continue with this proceeding instead of returning to state court, he will need to re-open this proceeding and abandon the unexhausted claim as described below. *See Reutter v. Crande*, 109 F.3d 575 (9th Cir. 1997). Alternatively, Slack may immediately commence a new federal action in which this court could review the merits of the unexhausted

claim because the new action would be subject to the statutory changes effected by the Antiterrorism and Effective Death Penalty Act (AEDPA);[4] however, relief could not be granted based on any unexhausted claim.

Pursuant to the AEDPA, the dismissal of this action will trigger the commencement of the one year statute of limitations period for Slack to return to federal court with a new action. 28 U.S.C. § 2244(d)(1). The time during which Slack's post conviction proceeding is pending in state court will not count toward the one year period. 28 U.S.C. § 2244(d)(2). Therefore, if Slack waits three months after this dismissal to file a state post conviction petition, he will have only nine months from the disposition of that state proceeding in which to commence a new federal proceeding. The failure to timely commence a new federal proceeding will bar Slack from having the validity of his conviction and/or sentence reviewed in federal court.

IT IS THEREFORE **ORDERED** that Slack's motion for reconsideration (#73) is **DENIED**.

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[4] Until recently, a federal court could not proceed with a mixed petition that contained both exhausted and unexhausted claims for habeas corpus relief. *Rose*, 455 U.S. at 521-22; *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983). However, in April 1996, Congress amended 28 U.S.C. § 2254 to give federal courts the authority to deny habeas relief based on unexhausted grounds. Thus, now a federal court can address a mixed petition, but can only deny relief regarding any unexhausted grounds.

IT IS FURTHER **ORDERED** that grounds two, four(C), five, six and seven are **DISMISSED** with prejudice as abusive.

IT IS FURTHER **ORDERED** that respondents' motion to dismiss (#67) is **GRANTED**, and this action is **DISMISSED** without prejudice. If Slack wishes to abandon the unexhausted claim and proceed with this action, he should file a motion to vacate the judgment and a declaration of abandonment, signed by petitioner, or the above identified ground within thirty (30) days. The Clerk shall enter judgment accordingly.

Dated this 30th day of March, 1998

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

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JOHN C. LAMBROSE
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Attorney for ANTONIO SLACK

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner,	)	CV-N-95-194-DWH
v.	)	NOTICE OF APPEAL
E.K. McDANIEL et al., Respondents.	)	(Filed Apr. 29, 1998)

NOTICE is hereby given that Antonio Slack, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment in a civil case dated March 31, 1998.

DATED this 28th day of April, 1998.

/s/ John C. Lambrose
JOHN C. LAMBROSE
Asst. Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender and is a person of such age and discretion as to be competent to serve papers.

That on April 28, 1998, she served a copy of the attached NOTICE OF APPEAL by placing a copy in a self addressed envelope postage prepaid to the addressee below:

Julie A. Slabaugh
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

Antonio Slack
#31395
Ely State Prison
PO Box 1989
Ely, NV 89301

/s/ Pamela M. Ramage
PAMELA M. RAMAGE

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Counsel for Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, vs. Director, NDOP, et al., Respondents.	)	CV-N-95-194-DWH
	)	**APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE**
	)	(Filed May 11, 1998)

COMES NOW, petitioner, Antonio T. Slack, and submits this application for a certificate of probable cause.

This application is based on the following points and authorities, as well as the pleadings and papers on file in this case.

Dated this 8th day of May, 1998.

Respectfully submitted,

/s/ John C. Lambrose
JOHN C. LAMBROSE
Asst. Federal Public Defender

I. POINTS AND AUTHORITIES

A. Facts

The petitioner commenced this action on March 27, 1995. CR 1. On February 13, 1997 this court appointed counsel CR 43. Thereafter, the petitioner filed his third amended petition.[1] The respondent moved to dismiss the third amended petition on procedural grounds. Specifically the respondent contended that grounds two, four(C), five, six and seven were abusive and sought a dismissal of those grounds.[2] The respondent did not specifically plead or allege how Slack's previous conduct regarding his federal writ history was indicative of an intent on his part to withhold claims in order to "vex or harass" the respondents or "delay" the final resolution of his federal remedy. *Farmer v. McDaniel*, 98 F.3d 1548, 1556 (9th Cir. 1996) (citations omitted). Instead, the respondent simply argued that Slack's failure to present the allegedly abusive claims in his previous 1991 § 2254 action resulted in per se abuse. See motion to dismiss at p. 9 ll. 22-28.

The respondent also contended that grounds two, four (C), three, most of five, six and seven were not exhausted and that fact rendered the third amended petition as "mixed" in nature requiring a dismissal of the instant case.[3] The petitioner opposed the motion to

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[1] The grounds raised in Slack's third amended petition are set out in this Court's March 30, 1998 Order at pages 2 and 3. CR.74.

[2] Slack's third amended petition alleged that grounds two and 4(C) were not exhausted. CR 74.

[3] The respondent did not plead any other procedural defenses. Moreover, although the respondent did not affirmatively seek a dismissal of this case without prejudice it must necessarily be assumed that a dismissal no exhaustion grounds is construed to be without prejudice. This court's order is in accord. CR 74 at p.7

dismiss arguing that no ground pled in the third amended petition was abusive. Opposition to Motion to Dismiss. Slack also argued against dismissal on exhaustion grounds as to any of the claims raised in the petition. Id.

On March 11, 1998 the court entered an interim order finding grounds two, four(C), five, six and seven abusive. CR 72. The court's conclusion was predicated on the fact that Slack's third amended petition contained grounds (two, four(c) five, six and seven) that were not pled in Slack's previous federal petition which had been dismissed on exhaustion grounds. Id. At p. 2 (comparing 1991 claims with claims in instant action). Without any further scrutiny of Slack's conduct – that is without any consideration of whether petitioner had any intent to vex, harass, or delay – the court concluded that the abusive grounds would be dismissed absent a demonstration of cause and prejudice. Id. Citing *McCleskey v. Zant*, 499 U.S. 467 (1991).[4]

On March 26, 1998 Slack asked the court to reconsider its decision arguing that: (1) the respondent failed to allege sufficient facts to support an abuse of the writ; (2) Slack's third amended petition was not a "second or successive petition"; (3) abuse of the writ is inapposite to

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[4] The court did not address Slack's argument that *McCleskey* standard could not apply in this case. See Opposition to motion to dismiss.

this case because the claims alleged in the third amended petition cannot be dismissed on exhaustion grounds. Motion to reconsider, filed March 26, 1998.[5]

On April 2, 1998 this court entered an order dismissing the action without prejudice. CR 74. The court concluded that grounds two, four(C), five, six and seven were abusive and dismissed those grounds accordingly. Id. This court did not resolve the respondent's exhaustion argument on these claims. The court did not discuss how Slack's previous federal writ history warranted such a harsh sanction. It simply adopted the respondent's position that Slack's failure to plead the claims in his 1991 petition was a per se abuse of the writ. CR 72. Finally, the court found that ground three was unexhausted and that fact rendered the petition "mixed" in nature requiring a dismissal of the instant action without prejudice. Id.

B. The amendments to § 2253 do not apply to cases filed prior to the AEDPA's effective date.

The antiterrorism and effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, signed into law on April 24, 1996, enacted the present 28 U.S.C.A. § 2253 (Supp. 1997, requiring a "certificate of appealability" in order for an appeal to be taken from a final order in a habeas proceeding. *See* 28 U.S.C.A. § 2253(b) (requiring "substantial showing of the denial of a constitutional right"). Prior to

[5] Slack had previously argued that the court could not dismiss any of the grounds under the exhaustion doctrine but the court's March 11, 1998 order did not resolve that issue.

the enactment of the AEDPA, § 2253 required a "certificate of probable cause" in order for an appeal to be taken from a final order in a habeas proceeding. *See* 28 U.S.C.A. § 2253 (1994).

The portions of the AEDPA which apply to noncapital cases have been held to be inapplicable to cases already pending when the Act was passed. *Lindh v. Murphy*, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (the portions of § 2254(d) dealing with noncapital cases are inapplicable to cases already pending when the Act was passed); *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (the AEDPA does not apply retroactively to cases filed in federal courts in Ninth Circuit prior to Act's effective date).

Slack filed his petition on May 30, 1995, well before the date the AEDPA was passed (April 24, 1996). CR 4. Accordingly, his case is governed by the pre-Act version of § 2253 (requiring a certificate of probable cause). The amendments to § 2253 promulgated by the AEDPA cannot apply retroactively to Slack's cases. *See Lindh*, and *Jeffries, see also Greenwalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997) (applying "certificate of probable cause") standard to dismissal of petition filed April 23, 1996).

C. Slack is entitled to a certificate of probable cause.

As shown above, however, the AEDPA does not apply to this matter. A CPC is appropriate where a petitioner can show a "substantial showing of the denial of a federal right." *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394-95, 77 L.Ed.2 1090) (1993)). To satisfy the

"substantial showing" standard, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n.4, 103 S.Ct. At 3395 n.4 (citations omitted).

1. It is at least debatable among jurists of reason that this court erred when it concluded that grounds two, four(C), five, six and seven were abusive.

a. The amended petition is not a "second or successive" one under Rule 9(b).

Initially, in order to preserve the question for review, petitioner submits that Rule 9(b) does not apply to his case at all, because the amended petition before the court is not a "second or successive" one within the meaning of the rule, since the previous federal petitions were dismissed without prejudice for exhaustion. Petitioner recognizes of course that the Court of Appeals has adopted a contrary position. *Farmer v. McDaniel*, 98 F.3d at 1556-1557. See also, Motion for Reconsideration at p. 3, filed March 26, 1998. Every other Court of Appeals that has addressed this issue, however, has held that a petition is not subject to Rule 9(b) as a "second or successive" one if previous petitions have been dismissed without prejudice for exhaustion. *McWilliams v. State of Colorado*, 121 F.3d 573, 575 (10th Cir. 1997); *Benton v. Washington*, 106 F.3d 162, 164 (7th Cir. 1996); *Camarano v. Irvin*, 98 F.3d 44, 46-47 (3d Cir. 1996); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997); *Woods v. Whitley*, 933 F.2d 321, 322 (5th Cir. 1991); *Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en

banc) *cert. denied*, 466 U.S. 976 (1984); *Dickson v. Maine*, 101 F.3d 791, 791 (1st Cir. 1996) (per curiam). In fact, the Court of Appeals for this circuit has created an intra-circuit conflict with *Farmer* by holding that a "second or successive" petition under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) – which uses the identical language in 28 U.S.C. §2244(b) that is used in, and was adopted from, Rule 9(b) – does not refer to a petition filed after a previous petition has been dismissed without prejudice for purposes of exhaustion. *In re Turner*, 101 F.3d 1323, 1323 (9th Cir. 1997). Further, the Supreme Court's intervening decision in *Calderon v. Thompson*, ___ U.S. ___, 1998 WL 204593 (U.S.) treats the definition of a "second or successive" petition as settled, referring only to petitions filed after a previous petition has been addressed on the merits. That decision undercuts the decision in *Farmer* and this court should not follow the *Farmer* definition of "second or successive" petition. In any event, in order to preserve this issue for review, *see* Sup. Ct. Rule 10.1(a) (conflicting decisions of Court of Appeals as basis for review on certiorari); Fed. R. App. P., Rule 35(a)(1) (securing uniformity of decision as ground for hearing en banc); petitioner submits that no part of the instant amended petition can be subject to dismissal under Rule 9(b) at all.[6]

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[6] This position is also supported by the decision of the Court of Appeals in *Calderon v. United States District Court (Taylor)*, 134 F.3d 981 (9th Cir. 1998), in which the court held that a district court has discretion to hold the exhausted part of a habeas petition in abeyance while dismissing the unexhausted claims for exhaustion. An amended petition, adding the claims following exhaustion, could not rationally be considered a

The *Turner* decision makes the jurisprudence in this circuit on this issue fundamentally incoherent. It is clear that the AEDPA was intended to, and did, impose restrictions of the filing of "second or successive" habeas corpus petitions in 28 U.S.C. §2244(b) that are more stringent than the preexisting caselaw on abuse of the writ. *E.g., Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 2340 (1996); *cf. Schlup v. Delo*, 513 U.S. 298 (1995); *McCleskey v. Zant*, 499 U.S. 467 (1991). Under *Turner*, however, it does not matter how many previous federal petitions have been dismissed for exhaustion: a new petition under the AEDPA is not a "second or successive" one under 28 U.S.C. §2244(b). Under the Court of Appeals' decision in *Farmer*, however, a petition can be treated as a "second or successive" one under the less stringent, pre-AEDPA law, and thus abuse could allegedly be found although it could not even be considered under current law.

b. Abuse of the writ does not apply to this case.

In dismissing the above grounds this court relied on the rule announced in *Farmer v. McDaniel*, supra. In *Farmer*, the Ninth Circuit held that in very limited circumstances a particular claim pled in § 2254 petition can be

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"second or successive" one under Rule 9(b); but there would be no difference in substance between that situation and the one presented here where the previous petitions was [sic] dismissed without prejudice in their entirety. Moreover, the petitioner's case is bolstered by the fact that he sought a stay in his earlier federal proceeding which was certainly appropriate under the then-existing rule in the Ninth Circuit. See Exh. B at tab 5; see also *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988)

dismissed even though the petitioner's previous § 2254 action had been dismissed without prejudice. Id. at p. 1560. The holding in *Farmer* does not apply to this case for several reasons. First, Farmer's previous federal writ history included three previous petitions spanning a period of nearly eight years. Id. At pp. 1549-1551. Slack, on the other hand, filed only one previous federal petition.[7] Second, Farmer was represented by counsel in each of his previous forays into federal court. Id. At p. 1348-1350. Slack's previous federal petition was litigated pro se. Id. Third, Farmer's previous federal litigation resulted in a more significant expenditure of federal judicial resources. Slack's previous federal petition was filed on November 27, 1991 and dismissed without prejudice less than ninety days later. See, Exh. A, *Slack v. Director*, CV-N-91-561-HDM at CR 1. The only "litigation" during that brief period of time involved the respondent's motion for extension of time (CR 4) to respond to the court's December 10, 1991 order directing that a response to the petition be filed no later than December 27, 1991. CR 3. On February 5, 1992 (five days prior to the respondent's new deadline) the petitioner asked to have the action held in abeyance while he returned to state court to exhaust his claims. CR 5. The court, instead, opted to dismiss the action without prejudice. CR 7. This occurred on February 19, 1992 and on July 10, 1992 Slack filed his state post-conviction petition. The final, and most compelling difference between Slack's procedural history and the history outlined in *Farmer* is that Slack

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[7] The previous federal file is attached to these points and authorities at Exh. A.

was never admonished, in any written order, that the failure to present all of his known claims for relief could result in a bar of those claims in a later federal action. Compare Exhibit A with 98 F.3d at p. 1550 n. 2.

The Ninth Circuit's decision in, *Farmer*, is explicitly very limited in scope. The court observed as much in three different sections of the opinion. 98 F.3d at p. 1549, 1554, and 1560. In *Farmer* the Ninth Circuit distilled its very narrow holding as follows:

> In short, what we hold, *and all that we hold*, is that the district court was not precluded as a matter of law from considering whether Farmer's conduct in failing to allege grounds in prior petitions that he alleged the third time around (if he did) was abusive solely on account of the fact that his prior petitions were not reviewed on the merits.

Id. at p. 1560 (emphasis supplied). The Ninth Circuit then remanded the case to the district court in order to determine whether Farmer's *amended petition in his third federal §2254 action* contained abusive grounds for relief. Id. However, the Court was careful to note that the fact that a previous federal petition was not reviewed on the merits is "an important factor that informs the court's discretion in applying the abuse of the writ doctrine." Id. At p. 1549. It is not dispositive and cannot, standing alone, end the inquiry. Slack's procedural history does not match the *Farmer* case nor does it bear any similarity other than Slack had a previous § 2254 petition dismissed without prejudice because it contained unexhausted claims. This court's per se finding of abuse in Slack's case is contrary to *Farmer's* admonition that before such a

conclusion can be reached a thorough inspection of the previous writ history is mandated so the court's exercise of discretion is "informed". Id.

Abuse of the writ as a procedural bar, focuses on the conduct and motive of the petitioner relative to his previous federal § 2254 litigation. "Abuse of the writ doctrine examines *petitioner's* conduct. The question is whether petitioner possesses, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter throughout the habeas process." 98 F.3d at 1560, quoting *McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (emphasis in original). This court can take judicial notice of the fact that at least one judge in the federal district of Nevada is in accord with this interpretation of *Farmer*. See, *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995) (observing that a court can take judicial notice of other state or federal proceedings). In *Pellegrini v. McDaniel* case no. CV-S-96-400 PMP(LRL), the district court was asked to find several of the petitioner's claims abusive because they were not presented in a previous federal petition. The court refused and predicated its decision on the fact that the previous action was litigated pro se, lasted less than four months, was filed in order to obtain a stay of execution, and was ultimately dismissed without prejudice. See exhibit B attached hereto.

c. If abuse of the writ applies to this case the respondent did not demonstrate that an abuse was committed.

This court concluded that abuse has been established as a matter of law because of the existence of a previous federal petition that was dismissed for exhaustion. This court relied, in part, on *McCleskey*. Petitioner submits that *McCleskey* overruled *Sanders v. United States*, 373 U.S. 1 (1963), only with respect to cases in which there has been a "first round of federal habeas," *McCleskey*, 499 U.S. at 490, and that *Sanders* states the applicable standard of abuse in non-*McCleskey* situations. This position is consistent with the decision of the Court of Appeals in *Farmer*. The court did not reach the question whether any of the claims in the amended petition were new, "or if they are, whether there has been any abuse of the writ. That is entirely for the district court to decide, in its discretion." *Farmer*, 98 F.3d at 1460 (footnote omitted). If the *McCleskey* standard of abuse applied in this situation, the Court of Appeals would have had no reason to reserve the question of abuse: any new claim would be abusive and the only issue would be whether petitioner could establish an excuse. There would also be no occasion for this court to exercise its discretion: if a new claim in a petition filed after the dismissal of previous petitions for exhaustion were subjected to the *McCleskey* standard, abuse would be demonstrated, as a matter of law, not as a matter of discretion.

Petitioner submits that the standard for establishing abuse in the non-*McCleskey* context remains the standard of *Sanders*. This court's conclusion that *McCleskey* overruled *Sanders* in toto – without any analysis and sub silentio – is simply not credible, in light of the undisputed fact that the Rule 9(b) codification of *Sanders* remains in effect for pre-AEDPA cases. *See Lonchar v. Thomas*, ___ U.S. ___, 115 S.Ct. 1293 (1996) (federal courts should not impose procedural requirements beyond those incorporated in habeas rules). It is equally impossible to conclude, in light of the emphasis placed in *McCleskey* on the costs of repetitive federal review of state convictions, that the *McCleskey* decision – again sub silentio – intended to erase all distinctions for abuse purposes between successor petitions filed after a complete round of federal habeas corpus review and petitions filed after a previous petition has been dismissed "without prejudice" for exhaustion and no federal review at all has occurred. Nothing in the *Farmer* or *McCleskey* decisions supports so radical a departure from prior law; and such a departure from previous law would not be consistent with the "evolutionary process" of abuse of the writ jurisprudence, *see Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 2340 (1996), but would be a quantum leap of logic.[8]

It is clear that *McCleskey* abuse does not apply in this case, because there was no prior determination of the

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[8] The per se rule could lead to truly surreal results. For example, a petitioner could file an amended petition as of right, under Fed. R. Civ. P., Rule 15(a); and the court could be forced by the state to conduct abuse of the writ analysis for failure to include claims in the initial petition which is superseded by the "second or successive" amended petition. In short, every amendment to every petition would be subjected to the same kind of abuse analysis that would be conducted if the petitioner had already received a complete round of federal court review of the claims on the merits in a first petition. Nothing in the Supreme Court's jurisprudence suggests so irrational a result.

merits. The second type of abuse may arise under the circumstances suggested by *Sanders*, upon which Rule 9(b) is based. This type of abuse requires a showing that a new claim in a petition was "deliberately withheld" from a previous petition, former 28 U.S.C. § 2244(b); *Sanders*, 373 U.S. at 18, or that the petitioner "deliberately abandon[ed]" the claim in a hearing on a previous petition, *id.*, citing *Wong Doo v. United States*, 265 U.S. 239, 241 (1924); or that the "only purpose" or the petition is "to vex, harass or delay," *Sanders*, 373 U.S. at 18; or that the petitioner is deliberately engaging in needless piecemeal litigation. *Sanders*, 373 U.S. at 18.

The *Farmer* decision explicitly acknowledged the continuing validity of these standards for non-*McCleskey* abuse:

> A federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner (1) made a conscious decision deliberately to withhold them from a prior petition, (2) is pursuing needless piecemeal litigation, or (3) has raised the claims only to vex, harass, or delay. Where there is no affirmative indication in the record that the petitioner made a conscious decision deliberately to withhold his claim, proceed by piecemeal litigation, to vex or harass or annoy the court or the state, a second petition raising a new claim is not an abuse of the writ.
>
> The state has presented no evidence that any of the factors outlined in *Sanders* are present. Moreover, there is nothing in the history of this case to indicate that Hamilton deliberately withheld his claim in the hope of being granted two hearings instead of one.

Farmer, 98 F.3d at 1559, *quoting Hamilton v. Vasquez*, 882 F.2d 1469, 1473 (9th Cir. 1989) (citations omitted).

This analysis of *Sanders* abuse is the only one that fits into the text and structure of the applicable statutes and rules. The *Farmer* decision emphasized the language of Rule 9(b) in concluding that abuse of the writ could be found, even if no prior proceeding on the merits of a previous petition had been conducted, relying on the language "[a] second or successive petition may be dismissed . . . if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." *Farmer*, 98 F.3d at 1555. The Advisory Committee Notes (1976) to Rule 9(b), quoted in *Farmer*, explicitly adopt the *Sanders* analysis of the standard of abuse under this theory:

> With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:
>
> In either case, full consideration of the merits of the new application can be avoided [only] if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.
>
> 373 U.S. at 17-18 [83 S.Ct. at 1078].

Farmer, 98 F.3d at 1555-1556. The Notes conclude that Rule 9(b) will not "eliminate a remedy to which the petitioner is rightfully entitled," and emphasize the language of *Sanders* holding that

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.
>
> 373 U.S. at 19 [83 S.Ct. at 1078].

Farmer, 98 F.3d at 1556.

Thus the non-*McCleskey* prong of Rule 9(b) incorporates the *Sanders* standards of abuse, as the Advisory Committee Notes clearly indicate. This conclusion is also the only one consistent with the settled principle of statutory construction that an enactment which employs a term of art (like "abuse of the writ") which has been judicially defined is presumed to have incorporated the judicial interpretation of the term. *E.g., McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989).

2. It is at least debatable among jurists of reason that this court erred when it concluded that ground three was not exhausted.

Ground three of the amended petition challenges the constitutionality of the use of evidence of sexual misconduct designed to prejudice the jury. Here, respondent argues that ground three is unexhausted because the claim was not presented as a violation of Slack's Fifth and

Fourteenth Amendments. The record belies that assertion. That Slack's right to due process is impinged by this violation of his right to a fair trial cannot come as surprise to the state. It is clear that the *analysis* employed at the appellate level inherently implicated due process and fair trial claims. The "unexhausted claims" upon which respondent relies cannot reasonably be said to have fundamentally altered the legal claim of prosecutorial misconduct or to reflect an attempt by petitioner to withhold facts or legal theory from the state courts. Petitioner's attempts to state as many specifics as possible underlying his claim of prosecutorial misconduct can hardly be said under the circumstances to have caused the claim to become unexhausted.

Moreover, the exhaustion doctrine does not require that a federal habeas corpus petitioner frame a claim in precisely the same manner in which it was set forth in the state court pleadings. *See Williams v. Holbrook*, 691 F.2d 3, 6 (1st Cir. 1982) (petitioner "not precluded from some reformulation of the claims . . . made in the state courts"). Respondent must not be allowed to extrapolate Slack's claims to the point of requiring that the federal petition be identical to the prior state petitions. *See Engle v. Isacc*, 456 U.S. 107, 123-124 n.25 (1982) ("a creative appellate judge could almost always distill an unexhausted due process claim . . . [W]e are reluctant to interpolate an unexhausted claim not directly presented by the petition. *Rose v. Lundy*, does not compel such harsh treatment of habeas petitions."). Thus, although respondent has attempted to "mix" Slack's petition, *see Lacey v. Gabriel*, 732 F.2d 7, 11-12 (1st Cir.) ("district court [could not] 'mix' Lacy's petition for him."), *cert. denied*, 469 U.S. 861

(1984), the rule requiring liberal construction of prisoners' pleadings should not be applied to Slack's disadvantage.

II. CONCLUSION

For the reasons stated Slack respectfully asks this Court for an order granting a certificate of probable cause.

Respectfully submitted,

/s/ John C. Lambrose
JOHN C. LAMBROSE
Assistant Federal Public Defender

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner,	)	CV-N-95-194-DWH
-vs-	)	
E.K. McDaniel, et al., Respondents.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on May 8, 1998, she served a copy of the above and foregoing document by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

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Deputy Attorney General
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/s/ Illegible

[EXHIBITS OMITTED]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO SLACK,
Petitioner,

vs.

E.K. McDANIEL,
et al.,
Respondents.

Case No. CV-N-95-194-DWH

DENIAL OF CERTIFICATE OF PROBABLE CAUSE

Petitioner Antonio Slack has filed a notice of appeal from the decision of this Court denying his petition for writ of habeas corpus. Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, the notice of appeal will also be considered as a request for the issuance of a certificate of probable cause. The Court of Appeals may not issue its ruling until this court first determines whether Slack has adequate grounds to pursue his appeal. Fed.R.App. P. 22(b); *McCarthy v. Harper*, 449 U.S. 1309 (1981); *Christian v. Rhode*, 41 F.3d 461, 470 (9th Cir.1994).

To obtain a certificate of probable cause to appeal the Court's denial of his petition, Slack need not show that he ought to prevail on the merits of his claims. He must, however, make a substantial showing of the denial of a federal right, and he must demonstrate that there exist legal issues "debatable among jurists of reason." In other words, Slack must show that a court could resolve the issues in a different manner, or that the questions he seeks to raise on appeal "are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983). Since Slack's appeal would not

raise any substantial issue, his request for a certificate of probable cause will be denied.

IT IS THEREFORE **ORDERED** that a certificate of probable cause is hereby **DENIED.**

Dated this 11 day of May, 1998.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

FRANKIE SUE DEL PAPA

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Attorney for Respondents.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ANTONIO SLACK, Petitioner, vs. E.K. McDANIEL, *et al.*, Respondents.	Case No. CV-N-95-194-DWH **OPPOSITION TO APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE**

COMES NOW, Respondents, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and hereby responds in opposition to Petitioner's Application for Certificate of Probable Cause. This opposition is made and based on the points and authorities attached hereto as well as all of the documents and pleadings on file herein.

RESPECTFULLY SUBMITTED this 18th day of May, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Julie A. Slabaugh
JULIE A. SLABAUGH
Deputy Attorney General
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POINTS AND AUTHORITIES

I. ARGUMENT

A. PETITIONER IS NOT ENTITLED TO A CERTIFICATE OF PROBABLE CAUSE.

The Ninth Circuit Court of Appeals in *Van Pilon v. Reed*, 799 F.2d 1332 (1986) stated:

> Moreover, the purpose of the requirement of a certificate of probable cause is to prevent abuse of the writ through frivolous appeals. *Barefoot v. Estelle*, 463 U.S. 880, 892-93, n.3, 103 S.Ct. 3383, 3394, n.3, 77 L.Ed.2d 1090 (1983). To obtain a certificate of probable cause, the petitioner must make a substantial showing of the denial of (a) federal right. *Id.* at 893, 103 S.Ct. at 3394 (*quoting Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925, 92 S.Ct. 1796, 32 L.Ed.2d 126 (1972)). By issuing a certificate, the district court notifies this court that in its opinion, the petitioner is not abusing the writ through frivolous litigation. The

requirement of a certificate, therefore, tends to screen frivolous appeals.

Van Pilon, at 1335.

Petitioner ANTONIO SLACK (hereinafter SLACK) has not made a substantial showing of a denial of a federal right. This Court properly dismissed SLACK's claims in grounds two, four(C), five, six, and seven as abusive in its order dated March 30, 1998. This Court also properly found that ground three was unexhausted. Therefore, any appeal would be frivolous.

B. THIS COURT DID NOT ERR WHEN IT HELD THAT GROUNDS TWO, FOUR(C), FIVE, SIX AND SEVEN WERE ABUSIVE.

In his application for certificate of probable cause (hereinafter application) SLACK contends that his amended petition is not a second or successive petition under Rule 9(b). In support of his argument SLACK, while conceding that the Ninth Circuit has adopted a contrary position, states that every other Court of appeals that has addressed this issue has held that a petition is not subject to Rule 9(b) as a second and successive petition if previous ones have been dismissed without prejudice for exhaustion. (Application, pg. 5.) SLACK then cites the following cases: *McWilliams v. State of Colorado*, 121 F.3d 573, 575 (10th Cir. 1997); *Benton v. Washington*, 106 F.3d 152, 154 (7th Cir. 1996); *Camarano v. Irvin*, 98 F.3d 44, 46-47 (3rd Cir. 1996); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997); *Woods v. Whitley*, 933 F.2d 321, 322 (5th Cir. 1991); *Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en banc), *cert. denied*, 466 U.S. 976 (1984); *Dickson v. Maine*,

101 F.3d 791 (1st Cir. 1996) (per curiam). SLACK's reliance on these cases is misplaced. Every case cited by SLACK is factually and procedurally distinct from this case.

The *McWilliams, Benton, Camarano, Gasery,* and *Dickson* cases involved an analysis under § 2244 after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In fact, these cases do not even mention abuse of the writ. All of these cases involve a petitioner who has returned to state court to exhaust his claims and has filed a subsequent petition containing only exhausted claims. One the cases, *Benton,* involved a previous petition that was never filed and therefore did not even qualify as an actual petition. The *Woods* and *Jones* cases involve petitions that were found to be abusive.

In this case, SLACK returned to State court to exhaust his claims and then filed a second federal petition containing unexhausted claims. Every one of the claims that this Court found were abusive are also unexhausted. (*See* Respondent's Motion to Dismiss filed January 29, 1998.)

SLACK also argues that the *Farmer* case has created an intra-circuit conflict. According to SLACK the Ninth Circuit has decided the issue in a contrary manner in *In re Turner,* 101 F.3d 1323 (9th Cir. 1997), a case decided under the law of the AEDPA. SLACK misunderstands the *Turner* case. The procedural circumstance in *Turner*, unlike the present circumstances, was a situation where the petitioner had previously filed a federal habeas petition, was allowed to return to state court to exhaust his unexhausted claims, did so, and returned to federal court with

the same claims exhausted. As pointed out above, SLACK has returned to federal court with additional unexhausted claims. In addition, the question in *Turner* was whether § 2244, under the AEDPA, applied when the prior petition was dismissed to allow exhaustion. Rule 9(b) is not even mentioned.

Finally, SLACK contends that the Supreme Court's opinion in *Calderon v. Thompson*, ___ U.S. ___ 1998 WL 204593 (U.S.) supports his opinion. *Calderon* has nothing whatsoever to do with the issue in this case and, contrary to SLACK's assertion, offers absolutely no support of his position.

The cases cited by SLACK do not support his position that Rule 9(b) does not apply to his amended petition. This Court's decision that grounds two, four(C), five, six, and seven were abusive as correct under *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996). SLACK is not entitled to a certificate of probable cause.

C. ABUSE OF THE WRIT APPLIES TO THIS CASE.

SLACK next argues that abuse of the writ does not apply to his case because he has filed only one prior federal petition, his prior petition was litigated pro se, his prior petition was dismissed without prejudice within ninety days and finally, that SLACK was never admonished, in a written order, that failure to present all of his claims could result in a bar of those claims in a later federal action. (Application pgs. 7-8). SLACK's argument has no merit.

There is nothing in Rule 9(b) or *Farmer* which supports SLACK's contention that abuse of the writ only applies if there have been two or more prior petitions, the petitioner was represented by counsel on each of his prior petitions, the prior petitions resulted in a "significant expenditure of federal judicial resources" (Application, pg. 7), and the prior federal court issued a written order advising the petitioner that the failure to raise all of his claims may bar those claims in future proceedings. Indeed, such requirements would virtually eliminate Rule 9(b).

Abuse of the writ occurs when there is a successive petition which does not raise new claims and the former petition was adjudicated on the merits or when the successive petition does raise new claims and the failure of the petitioner to raise those claims previously constitutes abuse. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Court foll. 28 U.S.C. § 2254; *see also Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1474 (1997). There are no other requirements in order for Rule 9(b) to apply. SLACK's argument to the contrary has no merit.

D. RESPONDENTS HAVE PROPERLY PLEAD ABUSE OF THE WRIT.

The most recent and thorough case dealing with the issue of successive petitions and abuse of the writ is *McCleskey v. Zant*, 111 S.Ct. 1454 (1991). Although *McCleskey* primarily deals with the issue of good cause, the case contains a fairly thorough discussion and history on abuse of the writ. On a Rule 9(b) issue, it is the

government's burden to plead abuse of the writ. *McCleskey* at 1470; *Sanders v. United States*, 373 U.S. 1, 10 (1963). A government meets its burden of pleading if it notes petitioner's prior writ history, indicates the claims appearing for the first time in a successive petition and affirms its belief that petitioner is abusing the writ in a manner prescribed by Rule 9(b). *McCleskey* at 1470. Abuse of the writ may be raised by the court *sua sponte*. *Jones v. Estelle*, 722 F.2d 159, 164 (5th Cir. 1983).

Once abuse of the writ has been alleged, petitioner has the burden of proving that he has not abused the writ. *McCleskey* at 1470; *Price v. Johnston*, 334 U.S. 266, 292 (1948). He must demonstrate "cause" and "prejudice" as those terms are understood in the context of procedural bar, for not presenting the claim in a prior petition. The "cause" element may be excused only if the failure of the federal court to address the claim would constitute a "fundamental miscarriage of justice," i.e., the claim would establish the petitioner's factual innocence. *McCleskey* at 1470-71.

SLACK states in his application that Respondents have not demonstrated that he has abused the writ. However, in their motion to dismiss Respondents properly plead abuse of the writ. The burden then shifted to SLACK to demonstrate that he did not abuse the writ. *McCleskey* at 1470. SLACK did not even attempt to meet his burden. Instead he filed a motion for reconsideration which this Court denied.

In his application, SLACK argues that Rule 9(b) of the rules governing section 2254 cases recognizes two types of abuse of the writ. Specifically, abuse occurs when

a petitioner files a new petition, following the adjudication of a former petition on the merits, which does not raise new claims. SLACK has elected to refer to this type of abuse as *McCleskey* abuse. The second type of abuse under 9(b) according to SLACK, requires a showing that a new claim was deliberately withheld from a previous petition, or that the petitioner deliberately abandoned his claim, or that the only purpose of the petition is to vex, harass, or delay or that the petitioner is deliberately engaging in needless, piecemeal litigation. (Application, pgs. 9-11.)

According to SLACK his two types of abuse have two different standards. With the so-called *McCleskey* abuse, the burden is on the petitioner to show cause and prejudice to overcome the abuse. SLACK then alleges that with the second type of abuse, the type alleged in this case, the burden is on the Respondents to prove that he deliberately withheld a claim in previous litigation, or that the petitioner is engaging in a pattern of needless piecemeal litigation, or is filing the petition solely to vex, harass or delay the opposing party. SLACK is simply wrong.

Abuse of the writ occurs when there is a successive petition which does not raise new claims and the former petition was adjudicated on the merits or when the successive petition does raise new claims and the failure of the petitioner to raise those claims previously constitutes abuse. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District court foll. 28 U.S.C. § 2254; *See also Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1474 (1997). There are not

separate "types" of abuse of the writ governed by different standards. However, there are several ways in which a petitioner can abuse the writ.

There is only one standard governing abuse of the writ, no matter what conduct by the petitioner is at issue. In *McCleskey v. Zant*, 111 S.Ct. 1454 (1991), the United States Supreme Court defined the abuse of the writ doctrine as follows:

> The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding. The terms "abuse of the writ" and "inexcusable neglect," on the one hand, and "procedural default," on the other, imply a background norm of procedural regularity binding on the petitioner. This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas. A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion. . . . In habeas, equity recognizes that a "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." . . . For these reasons, both the abuse-of-the writ doctrine and our procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.

Id. at 1468 (citations omitted).

The Supreme Court went on to say:

> The cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse-of-the-writ inquiry in the following manner. When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions.

Id. at 1470.

SLACK argues that his second type of abuse arises under *Sanders v. United States*, 83 S.Ct. 1068 (1963). However, *Sanders* did not create a separate type of abuse, it merely gave an example of conduct that constitutes abuse. The Supreme Court in *McCleskey* discussed *Sanders* stating:

> Although our decisions on the subject do not all admit of ready synthesis, one point emerges with clarity: Abuse of the writ is not confined to instances of deliberate abandonment. *Sanders* mentioned deliberate abandonment as but one example of conduct that disentitled a petitioner to relief.

McCleskey at 1467.

Sanders did not create a separate type of abuse of the writ, it simply discussed one example of a petitioner's conduct which would constitute abuse of the writ. SLACK's attempt to define different "types" of abuse of the writ notwithstanding, there is only one abuse of the writ doctrine which may triggered [sic] by different conduct by the petitioner.

Likewise there is only one standard governing abuse of the writ. Respondents have the burden of pleading abuse of the writ. This is accomplished by noting SLACK's prior writ history, identifying the claims he has raised for the first time and alleging that he has abused the writ. *McCleskey* at 1470. SLACK was given the opportunity to show cause and prejudice to overcome his abuse of the writ and he failed to do so. SLACK is not entitled to a certificate of probable cause.

E. IT IS NOT DEBATABLE AMONG JURISTS OF REASON THAT THIS COURT ERRED WHEN IT CONCLUDED THAT GROUND THREE WAS NOT EXHAUSTED.

SLACK attempts to demonstrate that he is entitled to a certificate of probable cause because jurists of reason could disagree as to whether or not his claim in ground three is unexhausted. In his argument SLACK completely ignores the United States Supreme Court's decision in *Duncan v. Henry*, 513 U.S. 364 (1995). *Duncan* is directly on point with the instant case. SLACK raised his challenge, to the admissibility of evidence that he had sex with his victim, on direct appeal solely as a matter of state evidentiary law, just as the petitioner in *Duncan* did. SLACK

never once mentioned that he was raising a claim under the United States Constitution. The absence of a federal constitutional claim is particularly glaring since SLACK did raise other issues as a violation of the United States Constitution just as the petitioner in *Duncan* did. *Duncan* at 888.

SLACK is attempting to argue the "essentially the same" standard as set forth in *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986). However, *Tamapua* is no longer viable in light of *Duncan*. *Keating v. Hood*, 133 F.3d 1240, 1241 (9th Cir. 1998) ("We have repudiated Tamapua on the basis of Duncan.") SLACK has not presented his federal constitutional claims set forth in ground three to the Nevada courts.

It is not debatable among jurists of reason that this Court erred in concluding that ground three was not exhausted. This Court's ruling was correct and SLACK is not entitled to a certificate of probable cause on this issue.

II. CONCLUSION

Based on the foregoing, Respondents respectfully request this Court deny SLACK's application for certificate of probable cause.

RESPECTFULLY SUBMITTED this 18th day of May, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Julie A. Slabaugh
JULIE A. SLABAUGH
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 18th day of May, 1998, I served a copy of the foregoing OPPOSITION TO APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE by mailing a true copy, postage prepaid, to:

JOHN C. LAMBROSE
Assistant Federal Public Defender
330 South Third Street
Las Vegas, Nevada 89101

/s/ Illegible

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTONIO TONTON SLACK, Petitioner, vs. E. K. MCDANIEL, Attorney General of the State of Nevada, Respondent.	No. 98-15943 DC# CV-95-194-DWH Nevada (Reno) ORDER (Filed July 7, 1998)

Before: THOMPSON and LEAVY, Circuit Judges

The request for a certificate of probable cause is denied.

Supreme Court of the United States

No. 98-6322

Antonio Tonton Slack,

Petitioner

v.

Eldon McDaniel, Warden, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust his state remedies and he subsequently exhausts his state remedies and refiled the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing "second or successive" habeas applications?

February 22, 1999

(8)

Supreme Court, U.S.
FILED
APR 22 1999
CLERK

No. 98-6322

In The

Supreme Court of the United States

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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70 pp

QUESTION PRESENTED

Rule 9 of the Rules Governing Section 2254 Cases, former 28 U.S.C. § 2244(b), and current 28 U.S.C. § 2244(b) each codify a bright-line rule of res judicata – known in habeas corpus practice as abuse of the writ – which governs the filing of "second or successive" habeas corpus applications. The question on which the Court granted review is:

> If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing 'second or successive' habeas applications?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to this proceeding.

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I.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying Mr. Slack's request for a certificate of probable cause to appeal is unpublished and is reproduced in the Joint Appendix (JA) at 197. The memorandum decision and order of the United States District Court is unpublished. JA 152.

II.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Mr. Slack's request for a certificate of probable cause to appeal was filed on July 7, 1998. A petition for writ of certiorari was filed on October 6, 1998. Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1978 (1998) ("this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability"). This court granted certiorari on February 22, 1999. JA 198.

III.

STATUTORY PROVISIONS INVOLVED

This case involves Rule 9(b) of the Rules Governing § 2254 Cases, and the provisions of former 28 U.S.C. § 2244(b), which was the statutory predicate for Rule 9(b). Because the question posed by the Court appears to pertain to "second or successive" applications in general, this case also involves the current provisions of 28 U.S.C. § 2244(b) enacted by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). These provisions are reproduced in an Appendix to this brief.

IV.

STATEMENT OF THE CASE

The Court's order granting certiorari on February 22, 1999 was limited to the following question:

> If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing 'second or successive' habeas applications?

The following facts and prior proceedings pertain to the question before the Court.

A. The Judgment Of Conviction And Direct Appeal.

In 1989, the State of Nevada charged 19-year-old petitioner Antonio Tonton Slack with first degree murder in connection with the death of Alanna Holmes, who died from a single close-range shot in the neck. The shooting took place at the apartment of Kamal Bey who owned the gun that fired the fatal shot. CR 16 (Exhibits in Support of Motion to Dismiss Petition for Writ of Habeas Corpus), Ex. 9 at 122, 133-134. Mr. Slack turned himself in to police soon after the shooting because he was "having nightmares about seeing her when we was playing with the gun and she died." *Id.* at 228. At trial, Mr. Slack testified in his own defense and admitted to having shot Ms. Holmes, but asserted that the killing was accidental. *Id.* at 221-223. Mr. Bey was the State's star witness, testifying that he did not believe Mr. Slack's contention that the shooting was accidental, because, although Mr. Slack exclaimed immediately after the shooting "Cuzz, cuzz, I shot her, I shot her. I ain't mean to shoot her," he looked strange, like he was about to "crack a smile." *Id.* at 138. On May 16, 1990, a jury acquitted Mr. Slack of first degree murder, but convicted him of second degree murder. The state trial court sentenced Mr. Slack to life in the Nevada State Prison for the second degree

murder, and imposed a consecutive life sentence because Mr. Slack had used a deadly weapon in connection with the killing. JA 3; *see* JA 36.

Mr. Slack pursued a timely direct appeal to the Nevada Supreme Court. On November 5, 1991, the Nevada Supreme Court dismissed Mr. Slack's appeal. JA 3.

B. Mr. Slack's Proper Person Federal Habeas Corpus Proceeding Is Dismissed Without Prejudice Less Than Three Months After It Is Filed.

Following the affirmance of his conviction on direct appeal, Mr. Slack filed a proper person petition for writ of habeas corpus in the United States District Court for the District of Nevada on November 27, 1991 (the 1991 filing). The 1991 filing raised the same issues Mr. Slack originally raised in his brief to the Nevada Supreme Court. JA 6. After the State of Nevada obtained an extension of time to answer, Mr. Slack moved to stay the proceedings "pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982)," so that he could pursue post-conviction relief proceedings in the Nevada state courts. Mr. Slack included in his motion a list of unexhausted issues that were not contained in his initial filing, which he proposed to exhaust during state court habeas corpus litigation. JA 17-18. On February 19, 1992, noting that there was "no objection by either party," JA 21, the district court dismissed the 1991 filing "without prejudice" and granted Mr. Slack leave "to file an application to renew upon exhaustion of all State remedies." JA 22.

C. Mr. Slack Returns To State Court To Exhaust His Claims.

On July 10, 1992, Mr. Slack, again acting in proper person, filed a post-conviction petition for writ of habeas corpus in the Nevada state trial court. Among other things, Mr. Slack alleged that he had been denied his Sixth and Fourteenth Amendment rights to the effective assistance of trial and appellate counsel, and made allegations of facts

outside the record supporting this claim.[1] Without appointing counsel, the state trial court summarily denied Mr. Slack's petition, finding that there was no need for trial counsel to interview witnesses or file pre-trial motions. JA 24. On February 1, 1993, Mr. Slack filed a timely notice of appeal, and a request for appointment of counsel. JA 23. On December 30, 1993, without appointing counsel, and without any briefing or oral argument, the Nevada Supreme Court dismissed the appeal, ruling only that Mr. Slack's claims were "repelled by the record." JA 31.

D. Mr. Slack Returns To Federal Court With An Exhausted Petition.

On March 27, 1995, Mr. Slack returned in proper person to the federal district court and filed an amended petition for writ of habeas corpus, which contained the claims Mr. Slack had just presented in the Nevada courts, as well as the issues he had raised in the 1991 filing. JA 35. Mr. Slack further notified the federal court of the 1991 filing, reminding the court that that filing had been "dismissed without prejudice." JA 45. On June 1, 1995, Mr. Slack filed a motion for the appointment of counsel alleging that he was "incompetent with the knowledge of litigating the law." JA 48. The State of Nevada opposed the motion, urging the court not to "waste

[1] These included an allegation that trial counsel failed to properly investigate a number of matters concerning the State's star witness, Kamal Bey, a juvenile who had originally been charged as an adult in connection with Ms. Holmes' killing because his fingerprints were found on the murder weapon, but who was given a six-month sentence in a prosecution in juvenile court. Mr. Slack alleged that trial counsel had been ineffective for failing to sufficiently investigate Mr. Bey's agreement with law enforcement authorities, especially by failing to request a copy of the agreement itself, which apparently required specific testimony from Mr. Bey before it would be enforced. JA 38. Mr. Slack also alleged that his trial counsel had failed to take sufficient steps to interview other witnesses who had testimony that could have refuted Mr. Bey's testimony, and failed to file pre-trial motions to exclude Mr. Bey's accomplice testimony. *Id.*

scarce judicial resources." JA 53. The State argued, "Slack acknowledges that he is receiving the benefit of services of the inmate law clerks. He is entitled to nothing more." JA 54. On February 29, 1996, the district court denied Mr. Slack's motion for the appointment of counsel. After the State filed additional procedural motions seeking a more definite statement and seeking to dismiss for lack of factual exhaustion, Mr. Slack renewed his request for the appointment of counsel. JA 56. The State again opposed the motion. JA 61.

On February 13, 1997, the district court finally concluded that it was "in the best interest of justice" to appoint counsel. JA 64. The district court appointed the Federal Public Defender to represent Mr. Slack, and directed counsel to "discuss and explore with petitioner, as fully as possible, the potential grounds for habeas corpus relief in Petitioner's case . . . advise petitioner that all possible grounds for habeas corpus should be raised at this time, and that failure to do so may result in loss of the omitted grounds under the rules regarding abuse of the writ;" and allowed counsel time to review the file and amend the petition. JA 64-65. On December 24, 1997, counsel filed an amended petition for writ of habeas corpus. JA 66.[2] Counsel acknowledged that claims 2

[2] The petition alleges seven federal constitutional grounds for relief:

(1) Insufficient evidence to support the conviction;

(2) Insufficient notice provided by the charging document;

(3) Improper introduction of evidence of Mr. Slack's sexual relationship with the victim;

(4) Failure of the trial court to properly instruct the jury on (a) reasonable doubt, (b) premeditation and deliberation, and (c) malice aforethought;

(5) Ineffective assistance of trial counsel through (a) failure to take steps to prevent the introduction of sexual misconduct evidence, (b) failure to object to improper jury instructions, and (c) failure to develop the facts of the case and present available defenses;

and 4(c) in the amended petition had not yet been presented to the state courts. JA 72, 78.

E. The District Court Dismisses Claims Raised By Mr. Slack's Federal Habeas Counsel As "Abusive" Under Rule 9(b), Even Though Mr. Slack Has Never Received A Federal Adjudication Of Any Claim.

On December 28, 1997, the State moved to dismiss based on the lack of complete exhaustion. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982). JA 92. The State also argued that all of the claims which had not been raised in the unadjudicated 1991 filing were subject to dismissal with prejudice for abuse of the writ. According to the State, by noting the existence of Mr. Slack's 1991 filing, and by pleading abuse of the writ, it had shifted the burden to Mr. Slack to demonstrate "cause and prejudice" under *McCleskey v. Zant*, 499 U.S. 467 (1991) and that, absent such a showing, the district court was compelled to dismiss claims 2, 4(c), 5, 6 and 7 as abusive, under the standards applicable to "second or successive" petitions. *See Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 520 U.S. 488 (1997); Rules Governing Section 2254 Cases, Rule 9(b). JA 103-110.

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(6) Ineffective assistance of appellate counsel; and

(7) Cumulative error.

These claims raise significant federal constitutional defects in the state proceedings. For instance, pursuant to statute, Nev. Rev. Stat. § 200.020(2), Mr. Slack's jury was instructed that "Malice **shall be implied** when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." (Emphasis supplied.) This instruction had the effect – especially in light of the fact that Mr. Slack claimed that the killing was accidental – of forcing the jury to presume malice unless Mr. Slack could demonstrate either that the decedent provoked him or that he did not possess an "abandoned and malignant heart." Such a mandatory presumption arguably violates *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Yates v. Aiken*, 484 U.S. 211 (1988).

In response, Mr. Slack argued that the substance of most of the claims in the petition had already been fairly presented to the state courts and thus met the exhaustion requirement. JA 132-134. Mr. Slack further asserted that, even if any of his claims were deemed unexhausted, those claims could not be barred as abusive because (1) he had not completed a "first round" of federal habeas because he had never received a prior adjudication of any of his claims; and (2) any unexhausted claims could not be deemed "abusive" under Rule 9(b) or under *Farmer* because they had not been deliberately withheld. JA 134-138.

On March 13, 1998, the district court entered an order concluding that because Mr. Slack had not raised Claims 2, 4(c), 5, 6 and 7 in his previous unadjudicated petition, those claims were presumptively abusive under Rule 9(b) and *McCleskey*. The district court accordingly directed Mr. Slack "to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds 2, 4(c), 5, 6 & 7 of the instant amended habeas petition." JA 143. The court's order held that the only way Mr. Slack could overcome a finding of abuse was to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice" – the standard *McCleskey* applies to "second or successive" petitions. JA 142-143.

On March 26, 1998, Mr. Slack filed a motion for reconsideration of the district court's order. JA 145. Mr. Slack argued that, because no prior adjudication had occurred, the amended petition could not constitute a "second or successive" one within the meaning of Rule 9(b). Mr. Slack accordingly argued that the court could not find the claims abusive under Rule 9(b) or under any other doctrine. JA 146-147, 149-150.

On March 31, 1998, the district court entered an order dismissing Mr. Slack's petition. The court dismissed grounds 2, 4(c), 5, 6 and 7 with prejudice on the ground that they were "abusive" under Rule 9(b), citing *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996) and *McCleskey v. Zant*, 499 U.S.

467 (1991), because they had not been raised in the initial unadjudicated petition. JA 155-156. The district court further concluded that Claim 3 was unexhausted because, although Mr. Slack had presented the facts supporting the claim to the state courts during the direct appeal, he "had not argued his Fifth or Fourteenth Amendment right to due process was violated when prejudicial evidence was presented to the jury." JA 157-158.

On April 29, 1998, Mr. Slack filed a timely notice of appeal. JA 161. On May 11, 1998, Mr. Slack filed an application for a certificate of probable cause to appeal, arguing that it was at least "debatable among jurists of reason" whether the lower court erred regarding its dismissal of Claims 2, 4(c), 5, 6 and 7 as abusive. Specifically, Mr. Slack explained that it is debatable (1) whether his amended petition constituted a "second or successive" one under Rule 9(b); (2) whether the lower court properly applied the abuse of the writ standard under these facts, where there was no showing that he had deliberately withheld any of the claims; and (3) whether the lower court properly determined that claim 3 was unexhausted. JA 163.

On May 19, 1998, the district court denied Mr. Slack's application for a certificate of probable cause to appeal. JA 182. On July 7, 1998, a two-judge panel of the Court of Appeals for the Ninth Circuit summarily denied Mr. Slack's request for a certificate of probable cause. JA 197. On February 22, 1999, this Court granted Mr. Slack's petition for certiorari. JA 198.

V.

SUMMARY OF THE ARGUMENT

For more than a century, this Court's exhaustion and abuse of the writ precedents have rested on the premise that a "second or successive" habeas corpus application is one filed after a previous federal application has been adjudicated on the merits. Settled exhaustion doctrine, including the "complete exhaustion" rule of *Rose v. Lundy*, 455 U.S. 509 (1982),

thus directly contemplates that a "without prejudice" dismissal for state court exhaustion proceedings will not have preclusive effect on any later federal habeas proceedings. Similarly, numerous abuse of the writ precedents explicitly describe the doctrine as a form of "res judicata," which by definition attaches preclusive weight only to a prior merits adjudication.

There are sound reasons why the Court has built its habeas corpus jurisprudence on the premise that no application for habeas corpus can be "second or successive" in the absence of a prior federal adjudication: That bright-line rule is the only one that makes any sense as a matter of comity, consistency and fairness. Anglo-American law has a "deep-rooted historic tradition that everyone should have his . . . day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (citations and internal quotation marks omitted). The doctrine of res judicata, which precludes a party from litigating claims that were, or could have been, adjudicated in a previous proceeding, "rests at bottom upon the ground that the party to be affected . . . , has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings." *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918) (citations omitted).

Without acknowledging these clear, well-grounded principles, the Ninth Circuit has substantially deprived prisoners such as Antonio Slack of any "opportunity to be heard" in federal habeas corpus proceedings, by adopting an ad hoc definition of the term "second or successive" that attaches preclusive, res judicata effect to a prior "without prejudice" dismissal for lack of complete exhaustion. The unfairness inherent in such a rule is demonstrated by this case, in which the district court applied the Ninth Circuit's punitive rule to bar Mr. Slack from pursuing his claims simply for trying to do what this Court contemplated under the complete exhaustion rule of *Rose v. Lundy*. After he filed his initial propria persona

federal petition, Mr. Slack realized that he had unexhausted constitutional claims in addition to those presented in the petition, and promptly asked the court to stay proceedings while he exhausted those claims. The parties, including the state, then agreed to dismissal of the petition without prejudice, and Mr. Slack, again in propria persona, promptly sought to litigate those claims in the state court. When he returned to federal court, however, the lower courts barred merits review of virtually all of Mr. Slack's claims by giving preclusive effect to the "without prejudice" dismissal. The effect of the Ninth Circuit's rule is that Mr. Slack's claims are precluded as a result of the 1991 habeas proceeding, in which he had no "opportunity to be heard" with respect to his unexhausted claims, and no "opportunity to litigate" those claims because of the complete exhaustion rule of *Rose v. Lundy*.

Such a rule runs directly counter to the promise of *Rose v. Lundy* that a dismissal for exhaustion is without prejudice to further proceedings; it wholly contradicts the principled evolution of the abuse of the writ doctrine as an aspect of res judicata, *see McCleskey v. Zant*, 499 U.S. 466, 489-90 (1991); *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Lonchar v. Thomas*, 517 U.S. 314, 323-324 (1996); and the Court must disavow it, just as every other lower court to consider the issue has done. Indeed, just last term, in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 1621 (1998), this Court said it would be "seemingly perverse" to apply a construction of "second or successive" application that would attach preclusive effect to a dismissal without prejudice for exhaustion. And yet, the Ninth Circuit has applied this "seemingly perverse" rule here to bar any consideration of the majority of Mr. Slack's claims.

Only three years ago, in *Lonchar v. Thomas*, 517 U.S. 314 (1996), the Court directed lower courts not to dismiss habeas corpus petitions in an "ad hoc" fashion, but to apply restrictions recognized by "formal judicial, statutory, or rules-based doctrines of law." This Court emphasized that clear

rules are of extreme importance in the habeas context because they "reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants." *Id.* at 324. The need for bright-line rules is "particularly strong when dismissal of a *first* habeas petition is at issue. Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 324 (emphasis in original).

The res judicata and exhaustion principles applied in *Martinez-Villareal* and *McCleskey* supply the "bright line" rule, limiting the application of the abuse doctrine to cases in which there has been a previous merits adjudication, which must govern the disposition of this case. Just as in *Lonchar*, the Ninth Circuit's attempt to deviate from "formal judicial, statutory, or rules-based doctrines of law," by treating a post-exhaustion habeas application as a "second or successive" one, is impermissible. Currently existing rules and statutes, including established principles governing exhaustion of remedies, *see Rose v. Lundy*, 455 U.S. 509, 520-22 (1982), and the applicable Federal Rules of Civil Procedure, provide a regular and predictable structure for conducting exhaustion procedures which is inconsistent with the ad hoc preclusion rule devised by the Ninth Circuit. The Ninth Circuit's unprecedented treatment of a post-exhaustion petition as "second or successive" habeas corpus application will, just as the *Lonchar* Court predicted, introduce substantial uncertainty and unfairness into habeas corpus litigation. By forcing the district courts to ignore constitutional claims that have been litigated or discovered during state court exhaustion proceedings, the Ninth Circuit's preclusion rule also vitiates the very comity concerns underlying the exhaustion doctrine. No legitimate purpose is served by such a rule. This Court should vacate the ruling below, and affirm the straightforward rule that the dismissal of a habeas application without prejudice for exhaustion, without adjudication of any claim, does not

make a renewed petition a "second or successive" habeas application.

VI.

ARGUMENT

A "SECOND OR SUCCESSIVE" HABEAS CORPUS APPLICATION CANNOT EXIST IN THE ABSENCE OF A PRIOR MERITS ADJUDICATION

A. Formal Judicial, Statutory And Rules-Based Doctrines Of Habeas Corpus Law All Make Clear That A Habeas Corpus Petition Cannot Be "Second Or Successive" In The Absence Of A Prior Merits Adjudication.

In *Lonchar*, this Court examined the "formal judicial, statutory, or rules-based doctrines of law" governing the resolution of habeas corpus petitions, 517 U.S. at 317, and then considered whether the rule adopted by the lower court could be supported within that framework. 517 U.S. at 323-332. The analysis here is identical. The "formal judicial, statutory, or rules-based doctrines of law" that apply to Mr. Slack's case make it clear that under well-established habeas corpus doctrine – governing exhaustion, abuse of the writ and the term "second or successive" application – a habeas application cannot be "second or successive" as to any claim if there has been no previous merits adjudication by a federal court.[3] The basis for the unprecedented ruling preventing Mr. Slack from litigating his claims in federal court is *Farmer v. McDaniel*, 98 F.3d 1548, 1555-57 (9th Cir. 1996), *cert. denied*, 520 U.S. 1188 (1997), in which a divided panel of the Ninth Circuit ruled that a petition can properly be labeled "second or

[3] Mr. Slack's petitions were filed before the enactment of AEDPA, and his case is therefore governed by pre-AEDPA law. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). As shown below, however, the definition of a "second or successive" habeas corpus application is the same under both AEDPA and pre-AEDPA law. *See* pp. 31-32, below.

successive" – and therefore "abusive" under Rule 9(b) – even though no prior federal adjudication had ever occurred. The analysis below demonstrates that, like the lower courts' rulings in *Lonchar*, the Ninth Circuit's *Farmer* rule has no historical, statutory or common law basis, and has no support in legitimate policy considerations. The Ninth Circuit's rule should accordingly meet the same fate as did the ad hoc rule in *Lonchar*.

1. This Court's Exhaustion Precedents Make Clear That A Habeas Application Filed After An Unconditional Federal Court Order Dismissing An Earlier Petition "Without Prejudice" For Lack Of Complete Exhaustion Cannot Be "Second Or Successive."

This is a case about how the rules that govern exhaustion of state court remedies interact with the claim-preclusion rules of the abuse of the writ doctrine. Analysis of this subject begins with *Rose v. Lundy*, 455 U.S. 509, 520-22 (1982), where the Court addressed the interplay between these two doctrines. *Rose* presented the question whether the inclusion of any unexhausted claims in a habeas corpus application compelled the dismissal of the entire petition. Recognizing that "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," *id.* at 518 (citations omitted), the *Rose* court adopted a "total exhaustion" rule. That rule requires the presentation of a fully exhausted habeas corpus petition prior to the adjudication of that petition by a federal court, and "requir[es] dismissal of petitions containing both exhausted and unexhausted claims." *Id.* at 519. In discussing why this rule would not constitute a trap for unwary litigants, this Court explained:

> Those prisoners who misunderstand this requirement and submit mixed petitions nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims.

Id. at 520. Justice O'Connor's plurality opinion warned, however, "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent petitions." *Id.* at 521.

Rose thus sets forth clear standards on how the exhaustion doctrine affects the course of federal habeas corpus litigation, and in particular how *Rose* affects the claim preclusion rules under the abuse of the writ doctrine. Under *Rose*, a federal habeas petitioner is presumptively entitled to only a single adjudication of his claims by the federal courts and that adjudication can occur only after the petitioner has fully exhausted any available state remedies for all of the constitutional claims on which he or she wants to proceed. Once a federal adjudication occurs, the litigation is presumptively over, and as *Rose* expressly makes clear, the federal adjudication creates the potential that later proceedings will constitute an "abuse of the writ" under Rule 9(b). Before an adjudication occurs and while state remedies remain "available," however, a litigant may (and generally must) return to state court to exhaust state remedies; and the federal court must dismiss the petition "without prejudice" so that the state courts remain free to control the scope of the exhaustion litigation without interference from the federal courts. In short, *Rose* holds that the federal courts must either "back off" until the state proceedings are over or, if state remedies are not available or effective, must adjudicate the federal petition under the same standards that govern all first petitions – at which point any federal collateral attack on the state court conviction will generally end.

Nothing in *Rose*, however, remotely supports the idea that the rules governing the exhaustion of state remedies – which are designed solely to channel claims in the first instance into the state courts and thereby to ensure that the state courts have the first opportunity to consider them – into a doctrine that precludes consideration of the claims of an unwary but non-abusive litigant, such as Mr. Slack. A doctrine intended to encourage petitioners to conduct thorough

exhaustion proceedings simply cannot be advanced by precluding federal consideration of the claims which are exhausted, and nothing in more than a century of exhaustion precedent condones or supports such a result. Rather, the Court's precedents have consistently recognized that the exhaustion rule is a doctrine which commands only deferring adjudication until the entire state court process has been completed, and is not a doctrine of preclusion.

2. This Court's Entire Body Of Exhaustion Law, As Well As Current Statutes Dealing With Exhaustion, Make Clear That The Doctrine Is Solely About Abstaining From Interference With State Court Proceedings, And Is Not In Any Way A Rule Of Preclusion.

More than 110 years ago, in *Ex Parte Royall*, 117 U.S. 241, 251-52 (1886), the Court affirmed lower court decisions dismissing habeas corpus petitions, on the ground that state court proceedings had not yet been completed. The Court reasoned that exhaustion of remedies was necessary:

> in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution. . . . [The instant federal petition does not] suggest any reason why the state court of original jurisdiction may not, without interference upon the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted.

Id. at 252-53. The Court accordingly affirmed the dismissals, but explicitly "without prejudice to the right of the petitioner to renew his application to that court at some future time should the circumstances render it proper to do so." *Id.* at 254.

In *Whitten v. Tomlinson*, 160 U.S. 231 (1895), the Court affirmed a federal court dismissal of a pre-exhaustion petition, again "without prejudice to the right of the petitioner to renew the motion," 160 U.S. at 299, explaining that the prisoner should not be discharged:

> in advance of any proceedings in the courts of the state to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states, and with the performance by this Court of its appropriate duties.

Id. at 247. *Accord*, *Riggins v. United States*, 199 U.S. 547, 551 (1905) (dismissal without prejudice for exhaustion required by "settled rule"); *Baker v. Grice*, 169 U.S. 284, 293 (1898).

This principle of deferring federal court adjudication had become black-letter law by the time of *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17-18 (1925), where the Court held that "in the regular and ordinary course of procedure, the power of the highest state court in respect of [constitutional] questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him." The Court relied not only on *Ex Parte Royall* on this point, but on a line of eleven exhaustion cases decided since 1886. *Tyler*, 269 U.S. at 18.

The Court has applied these principles to a procedural situation indistinguishable from Mr. Slack's. In *Ex Parte Hawk*, 321 U.S. 114 (1944) (per curiam), the petitioner had been convicted of murder and the state supreme court affirmed the conviction on direct appeal. Mr. Hawk then proceeded directly to federal court, and the federal court dismissed his petition for lack of complete exhaustion. The state courts summarily denied Mr. Hawk's petition for writ of habeas corpus, and Mr. Hawk filed another federal habeas corpus petition, which the lower federal courts dismissed for lack of complete exhaustion. *Id.* at 115-16. On appeal, this Court observed that "petitioner has not yet shown that he has

exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief." *Id.* at 116. The Court then sketched out the state court remedies that remained available to Mr. Hawk, and determined that "as petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice. . . . " *Id.* at 118. "In 1948, Congress codified the exhaustion doctrine in 28 U.S.C. § 2254, citing *Ex Parte Hawk* as correctly stating the principle of exhaustion." *Rose v. Lundy*, 455 U.S. 509, 516 (1982) (plurality opinion); *accord*, *Darr v. Burford*, 339 U.S. 200, 214 (1950); *Irvin v. Dowd*, 359 U.S. 394, 405 (1959).

In *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973), the Court again explained the policies underlying the exhaustion doctrine:

> As applied in our earlier decisions, the [exhaustion] doctrine preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in the state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federal protected interests. Second, [the doctrine] preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal judicial proceedings.

(Emphasis added.)

Like *Rose*, recent cases have reaffirmed the fundamental principle that the federal courts should refrain from making any adjudication on the merits until all the available state court proceedings have run their course. *Vasquez v. Hillery*, 474 U.S. 254, 247 (1986) ("exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary."); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam) (exhaustion doctrine "serves to minimize friction between our state and federal systems of justice by allowing the State an initial opportunity to pass upon and correct

alleged violations of prisoner's rights"); *Picard v. O'Connor*, 404 U.S. 270, 275 (1971) (exhaustion doctrine designed to give "States an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights. [citations] We have consistently adhered to this federal policy for it would be unseemly for a federal district court to upset a state court conviction without an opportunity to correct a constitutional violation."); *see also Granberry v. Greer*, 481 U.S. 129, 134 (1987) (where non-exhaustion not raised, comity and federalism interests provide federal courts with discretion to address claims forthwith or to require "series of additional state and district court proceedings before reviewing the merits of the petitioner's claims.")

Just as *Rose* did, these authorities establish a clear duty for the lower federal courts: Either let the state proceedings run their course, or entirely adjudicate the federal application. More specifically, the Court's exhaustion teachings provide federal courts with two options when faced with a habeas corpus petition that does not consist solely of exhausted claims: (1) Dismiss the petition without prejudice and require additional state court proceedings before conducting a presumptively final adjudication; or (2) "Address the merits forthwith" if special circumstances, such as "unavailable" or "ineffective" state court remedies, or the circumstances expressly set forth in § 2254(b)(2), will permit doing so.[4]

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[4] For instance, dismissal is not required when an applicant's unexhausted claims would be barred by an independent, clearly-established, regularly-applied state procedural rule. Nevada has chosen not to impose such absolute impediments to state collateral review as a matter of state law. *See, e.g., Glauner v. State*, 107 Nev. 482, 813 P.2d 1001 (1991) (per curiam) (no statute of limitations in collateral proceedings); *Pertgen v. State*, 110 Nev. 554, 875 P.2d 361, 364 (1994) (per curiam) (Nevada courts examine merits of constitutional claim to determine if procedural bar applies). Imposition of an anticipatory state default bar by a federal court is impermissible unless state courts would necessarily be required to apply a default rule. *See, e.g., Banks v. Horn*, 126 F.3d 206, 212-13 (3d Cir. 1997); *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996); *Woods v. Kemna*, 13 F.3d 1244, 1245-46 (8th Cir. 1994); *Ashker v. Leapley*, 5 F.3d 1178, 1180 (8th Cir. 1993); *Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993) (dismissing possibly defaulted claim on nonexhaustion grounds in interest of "federal-state comity" so that state courts can determine whether petitioner qualifies for exception to state procedural rule); *Johnson v. Lewis*, 929 F.2d 460, 464 (9th Cir. 1991). Federal courts that sit in states that have clear procedural prohibitions on successive review, however, can apply those rules in the course of adjudicating an otherwise unexhausted petition. Under *Castille v. Peoples*, 489 U.S. 346, 351-52 (1989), a federal court need not dismiss a mixed petition where "it is clear that [the petitioner's otherwise unexhausted] claims are now procedurally barred under [state] law." This is because "a habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

Neither AEDPA, nor *Granberry*, nor *Rose*, nor any of the Court's exhaustion decisions suggest that the federal courts may limit further proceedings to claims already contained in an unexhausted and dismissed federal habeas petition. And the reason for the omission is plain: such an option would be inconsistent with the comity interests that underlie the exhaustion doctrine by allowing the federal courts to interfere with ongoing state proceedings while at the same time avoiding a final federal adjudication of the merits of any claim.

3. Dismissal Without Prejudice Is Not A Judgment On The Merits And Therefore Cannot Be Given Preclusive Effect.

The complete exhaustion rule of *Rose v. Lundy* is designed to avoid premature federal adjudication of constitutional claims, by allowing the state court proceedings to address the claims first. A necessary concomitant of such abstention is that the federal court does not adjudicate any claim by dismissing a premature federal petition: abstention is a doctrine that postpones federal adjudication but does not preclude it. *E.g., Coleman v. Thompson*, 501 U.S. 722, 731 (1991). This rule is consistent with the general law relating to

dismissals without prejudice and with res judicata principles. *See* pp. 21, 24-27 below. It has always been clear that a dismissal for lack of exhaustion is "without prejudice,"[5] and "dismissal without prejudice is a dismissal that does not operate as an adjudication on the merits, [citation], and thus does not have res judicata effect." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 396 (1990), quoting in part, Fed. R. Civ. P. 41(b); *accord Public Service Commission of Missouri v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 626-27 (1941) (holding order of dismissal "without prejudice to the right of defendants to maintain an independent action or suit thereon," had no preclusive effect on later action involving same subject matter); *United States v. Seckinger*, 397 U.S. 203, 206 n.6 (1970) (holding prior dismissal, that expressly "left open the option of the United States to pursue its claim against Seckinger at a later time," did not trigger principles of res judicata).[6]

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[5] Although all of the controlling authorities require "without prejudice" dismissals, nothing in those authorities would prohibit a "without prejudice" dismissal "under the terms and conditions as the court deems proper," Fed. R. Civ. P. 41(a)(2), which could include a condition expressly requiring that any petition filed after returning from state court contain only exhausted claims. Such a rule would allow the exhaustion proceeding to be conducted without any limitation imposed by the federal courts, and would avoid a strained and unprecedented interpretation of the exhaustion and abuse of the writ doctrines by tying the court's power to limit the exhaustion procedure to already existing rules and jurisprudence. *See* p. 47, below.

[6] The lower courts have, of course, uniformly followed this rule. *E.g.*, *Mann v. Haigh*, 120 F.3d 34, 36 (4th Cir. 1997) ("the district court's earlier dismissal was made expressly without prejudice and, accordingly, has neither an issue nor a claim preclusive effect."); *Bowden v. United States*, 106 F.3d 433, 441 (D.C .Cir. 1997) ("The district court based its dismissal of that claim on its earlier dismissal of the identical claim in Bowden's initial suit. Because the earlier dismissal was without prejudice, however, it cannot provide the foundation for the dismissal that is before us now."); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993) (quoting *Cooter v. Gell*); *Heath v. Cleary*, 708 F.2d 1376, 1380 n.4 (9th Cir. 1983) (dismissal for exhaustion of administrative remedies not judgment on merits and has no preclusive effect); *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959) ("a suit dismissed without prejudice pursuant to Rule 41(a)(2) leaves the situation the same as if the suit had never been brought in the first place.").

All courts agree that dismissals for lack of complete exhaustion in the habeas context must be without prejudice. *E.g.*, *O'Guinn v. Dutton*, 88 F.3d 1409, 1411-13 (6th Cir. 1996) (en banc); *Johnson v. Lewis*, 929 F.2d 460, 464 (9th Cir. 1991). In this case, however, the fact that the previous dismissal was without prejudice did not prevent the Ninth Circuit from attaching a prejudicial preclusive effect to that dismissal.

4. The Ninth Circuit's Rule Cannot Be Squared With The Applicable Exhaustion Principles.

The rule applied by the Ninth Circuit in this case failed to acknowledge or apply these principles. Instead the Ninth Circuit rule reduces a dismissal "without prejudice" for exhaustion proceedings to a cruel hoax, because it gives the dismissal preclusive effect as to any claim not in the prematurely-filed petition. This procedure misleads the petitioner as to the character of the dismissal in a way that *Rose v. Lundy* does not remotely countenance, and it places Mr. Slack in the same position as the petitioner in *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1620. In that case, the district court and the Court of Appeals ruled that the judgment in the petitioner's fourth federal habeas corpus proceeding would not bar later consideration of his *Ford* claim, *Ford v. Wainwright*, 477 U.S. 399 (1986), because it was premature, but when he later attempted to assert it the district court held that the claim was barred as "second or successive." Here, the district court assured Mr. Slack, by the order dismissing the initial petition "without prejudice" for exhaustion and granting leave to "renew" his action after exhaustion proceedings, that the judgment would not have preclusive effect, and the state did not object to that action. JA 21-22. When Mr. Slack returned to federal court, however, the district court did apply a preclusion bar, just as the district court did in *Martinez-Villareal*.

Such a rule turns the exhaustion rule into exactly what the court in *Rose v. Lundy* said it was not, a trap for the unwary.

The Ninth Circuit rule also violates the due process element of the res judicata doctrine. The validity of an application of res judicata under the due process guarantee of the Fifth or Fourteenth Amendment depends upon whether the party sought to be precluded had an adequate opportunity to litigate the claim in the earlier proceeding. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793, 797 n. 4 (1996); pp. 25-26, below. Mr. Slack could not have litigated his unexhausted claims in the 1991 filing precisely because they were unexhausted. To hold that these claims are precluded by the dismissal of that premature petition mocks the exhaustion doctrine and this Court's well-settled jurisprudence.

Nothing in the history, purpose or language of the exhaustion doctrine permits such a result, which this Court characterized in *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1621, as "seemingly perverse." Rather, sound application of those principles compels a finding that, when the district court refrained from adjudication by dismissing Mr. Slack's 1991 filing "without prejudice," that dismissal had no preclusive effect on later state court and federal court proceedings. The answer to the question posed by the Court is thus clear as a matter of settled exhaustion doctrine: Where a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies, and he subsequently exhausts his state remedies and refiles the § 2254 petition, the earlier "without prejudice" dismissal can have no preclusive effect, and claims included within that petition that were not included within his initial § 2254 filing are not "second or successive" habeas applications.

B. This Court's Abuse Of The Writ Precedents – Which Describe That Doctrine As A "Modified Res Judicata Rule" – Make Clear That No Petition Can Be "Second Or Successive" In The Absence Of A Prior Merits Adjudication.

The Ninth Circuit rule giving preclusive effect to a "without prejudice" dismissal not only clashes with settled exhaustion law, it runs equally afoul of this Court's precedents concerning abuse of the writ. The Court's decisions dealing with the "modified res judicata" abuse of the writ doctrine demonstrate that Rule 9 of the Rules Governing Section 2254 Cases, former 28 U.S.C. § 2244(b), and current 28 U.S.C. § 2244(b), have applied a bright-line res judicata rule in determining what constitutes a "second or successive" habeas application. Any bright-line rule of "res judicata"must focus its inquiry on the effect of a prior federal adjudication – as the Court consistently has – and not on the mere filing of a federal petition that was dismissed "without prejudice." The vice of the Ninth Circuit rule is that it gives preclusive effect to a dismissal without prejudice just as it would give preclusive effect to a "first round" of habeas corpus litigation on the merits.

1. The Court Applies Res Judicata Principles In The Habeas Context Through The Abuse Of The Writ Doctrine By Attaching "Vital Relevance" To A Prior Adjudication.

In *McCleskey v. Zant*, 499 U.S. 467, 489 (1991), this Court brought the abuse of the writ doctrine applied under Rule 9(b) substantially into line with traditional res judicata principles. It held that a "second or successive" habeas corpus application could not be entertained unless the court found "cause and prejudice" for the failure to raise the claims in the "first round" of habeas corpus litigation, or found that a "miscarriage of justice" would result from refusal to entertain the petition. Examining caselaw from *Ex Parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889), through *Salinger v. Loisel*, 265 U.S.

224 (1924), *Wong Doo v. United States*, 265 U.S. 239 (1924), *Price v. Johnston*, 334 U.S. 266 (1948), and *Sanders v. United States*, 373 U.S. 1 (1963), and through the modern codification of the doctrine in former § 2244(b) and Rule 9(b), the Court recognized that cases such as *Cuddy*, *Salinger* and *Wong Doo*, had "adopted a middle position between the extremes of res judicata and endless successive applications." *McCleskey*, 499 U.S. at 480. The history of the "abuse of the writ" doctrine demonstrated that early cases, such as *Wong Doo*, had given "controlling weight" to the existence of a "a prior refusal to discharge on a like application," and the Court concluded:

> So while we rejected res judicata in a strict sense as a basis for dismissing a later habeas action, we made clear that **the prior adjudication bore vital relevance** to the exercise of the Court's discretion in determining whether to consider the petition.

McCleskey, 499 U.S. at 482. (Emphasis supplied).

The *McCleskey* court noted that current statutes and rules continue to describe the abuse doctrine as "a qualified application of the doctrine of res judicata" *id.* at 486, *quoting*, S.Rep. No. 1797 at 2, U.S. Code Cong. & Admin. News 1966, p. 3664, and emphasized that other cases, including *Woodard v. Hutchins*, 464 U.S. 377 (1984) (per curiam); *Antone v. Dugger*, 465 U.S. 200 (1984) (per curiam); and *Rose v. Lundy*, 455 U.S. 509, 521 (1982) (plurality opinion), had also focused on the presence or absence of a prior adjudication. *McCleskey*, 499 U.S. at 487-89. *McCleskey* relied on all of these decisions to support the adoption of a "modified res judicata" rule in habeas corpus cases that places strict limits on a district court's discretion to consider "second or successive" petitions, because scarce judicial resources should be expended upon those litigants pursuing their "first round of federal habeas. . . . " *Id.* at 1469.

McCleskey thus adopted a straightforward, bright-line rule that gives preclusive effect to a prior federal adjudication, which can be overcome only where a litigant demonstrates either "cause and prejudice" or a "miscarriage of

justice." The cases following *McCleskey* have all reaffirmed the presumptive "res judicata" effect of the initial adjudication, and have carefully distinguished between proceedings filed before and after an initial federal adjudication. *E.g.*, *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 1502 (1998) (rules of habeas litigation change drastically when court has "to revisit the merits of an earlier decision denying habeas relief" because petitioner "has already had extensive review of his claims in federal and state court."); *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (AEDPA codifies "modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ' "); *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (statutory and caselaw developments result in "qualified application of the doctrine of res judicata"). In sharp contrast, the court has disapproved attempts to place restrictions on first habeas corpus petitions, even in the face of apparently inequitable conduct, where no previous federal adjudication of constitutional claims has occurred. *Lonchar v. Thomas*, 517 U.S. 314, 321 (1996).

2. Res Judicata And Its Habeas Corpus Analogue, Abuse Of The Writ, Cannot Apply In The Absence Of A Prior Merits Adjudication.

By essentially equating the abuse of the writ doctrine with res judicata, this Court incorporated a body of clear, settled doctrine as to claim preclusion. This Court explained in *Cromwell v. County of Sac.*, 94 U.S. 351, 352-53 (1876), that the res judicata rule teaches that a prior

> judgment, if rendered upon the merits, constitutes an absolute bar to subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privy with them, not only as to every matter which was offered and received, but as to any other admissible matter which might have been offered for that purpose.

Accord, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319 (1927); *Kremer v. Chemical Construction Corp.*, 456 U.S.

461, 466-67 n.6 (1982) ("Invocation of res judicata and collateral estoppel relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, **encourages reliance on adjudication"** (emphasis added)).

Because the entire doctrine centers on the need to "encourage reliance on adjudication," it is hornbook law that res judicata applies only where the initial proceeding resulted in a disposition on the merits. American Law Institute, *Restatement of the Law (Second), Judgments* § 20(1)(b), (2) at 170 (judgment based on dismissal without prejudice or prematurity of action not bar), and Comments (g, k), at 174-175 (1980), *see also id.*, §§ 13, 17. The principle that a res judicata preclusion bar cannot be imposed unless the party had an adequate opportunity to be heard in the previous proceeding, in order to satisfy due process concerns, is equally clear. *E.g.*, *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918).[7] In other words, as the *McCleskey* Court observed, res judicata – and its analogue in habeas corpus practice, abuse of the writ – attaches "vital relevance" to the "prior adjudication." *McCleskey*, 499 U.S. at 482. Thus, in cases such as *McCleskey*, *Schlup*, *Felker* and *Thompson*, where a prior federal adjudication had in fact occurred, and

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[7] The limitation of the res judicata bar to cases in which the party could have brought the matter to a dispositive hearing in the previous proceeding was well established at the time of the adoption of the constitution. *E.g.*, *Pickett v. Loggon*, 14 Vesey 215, 232-234, 33 Eng. Rep. 503, 510 (Ch. 1807) (prior judgment, when case came to hearing, acts as bar); *Duchess of Kingston's Case*, Ambler 756, 762-763, 27 Eng. Rep. 487, 490 (Ch. 1775); *Cann v. Cann*, 1 P. Wms. 723, 725-727, 24 Eng. Rep. 586, 587 (K.B. 1721) (no reexamination when case previously "examined and determined"); *Earl of Peterborough's Case*, 1 Bro. P.C. 281, 283, 2 Eng. Rep. 893, 894 (H.L. 1709) (relitigation barred "after issued joined"); *see Aspden v. Nixon*, 45 U.S. (4 How.) 467, 499 (1846); *The Mary*, 13 U.S. (9 Cranch) 126, 145-146 (1815) (party who had "full opportunity to assert his rights" bound by judgment). That protection is therefore implicit in the constitutional guarantee of due process of law. *See, e.g.*, *Medina v. California*, 505 U.S. 437, 446-447 (1992).

the new claims could have been, but were not, litigated in the prior proceeding, the Court precluded further litigation in the absence of compelling circumstances such as "cause and prejudice" or "miscarriage of justice." By contrast, in *Lonchar*, where no prior adjudication had occurred, this Court found that no preclusive effect could attach to prior proceedings, even in the face of allegedly intentional, manipulative delay by the petitioner.

3. Martinez-Villareal Reaffirms That The Abuse Of The Writ Doctrine Is Simply The Habeas Corpus Version Of Res Judicata.

This Court's most recent abuse of the writ decision, *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), clearly illustrates all of these principles, in the context of AEDPA. In *Martinez-Villareal*, the state courts had convicted Mr. Martinez-Villareal of murder and sentenced him to death. 118 S.Ct at 1619. In addition to state petitions for collateral relief, Mr. Martinez-Villareal filed three petitions for habeas corpus relief in federal court prior to 1993. The federal district court dismissed all of these petitions to allow Mr. Martinez-Villareal to exhaust state remedies. 118 S.Ct. at 1619-20. He then filed a fourth petition, which included for the first time a claim of incompetence to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). The district court granted relief as to the sentence on the basis of other claims in the petition but the grant of relief was reversed on appeal. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir. 1996). The district court dismissed the claim of incompetence to be executed on the ground that it was premature, and the Court of Appeals agreed that the denial of the petition would not affect later litigation of the claim. *Id.* at 1309 n.1.

After the adoption of AEDPA, however, when Mr. Martinez-Villareal moved in the district court to re-open the litigation on the fourth petition, the state objected that the district court had no jurisdiction to address the petition. The

district court ruled that it lacked jurisdiction over any claim as a "second or successive" application under 28 U.S.C. § 2244(b)(3)(A). The petitioner then filed a motion in the Court of Appeals for leave to file a "second or successive" petition under 28 U.S.C. § 2244(b)(3). The Ninth Circuit dismissed the motion and ordered the petition transferred to the district court, holding that the application to re-open the petition did not constitute a "second or successive" application for habeas corpus relief because the *Ford* claim had not been adjudicated in the previous habeas proceeding. *Martinez-Villareal v. Stewart*, 118 F.3d 628, 632-633 (9th Cir. 1998) (per curiam).

This Court affirmed. Chief Justice Rehnquist, writing for the majority, focused on the question of jurisdiction, since the Court would not have jurisdiction under the AEDPA to review a decision of the Court of Appeals granting or denying permission to file a "second or successive" habeas corpus petition. 28 U.S.C. § 2244 (b)(3)(E); *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1620. This Court concluded that the proceeding was properly before it, explaining that

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim but this does not mean there were two separate applications, the second of which was necessarily subject to § 2244(b). There was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. Respondent was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.

Id. at 1621.

In holding that Mr. Martinez-Villareal's *Ford* claim, which had previously been dismissed without an adjudication on the merits, did not constitute a "second or successive" application for relief, the Court analyzed that question as controlled by its precedents dealing with the exhaustion defense, including *Rose* and *Ex Parte Royall*, and it ultimately

rejected the argument that a "second or successive" petition included one that was filed after a previous petition had been dismissed without prejudice for exhaustion as "seemingly perverse." 118 S.Ct. at 1621. As the Court explained, "[N]one of our cases expounding this [exhaustion] doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition." *Id.* at 1622.

The Court reasoned that, although Mr. Martinez-Villareal's *Ford* claim was not exactly like his three previous applications that had been dismissed without prejudice for lack of complete exhaustion, the result should be identical because "in both situations, the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." 118 S.Ct. at 1622. The Court concluded that such a result would not be justified under any of its teachings, including the res judicata rule applied in *McCleskey*, *Schlup* and *Felker*, because "it is certain that respondent's *Ford* claim would not be barred under principles of res judicata." *Id.* The Court accordingly affirmed the Court of Appeals' ruling that the petitioner's application to review his *Ford* claim was not barred as a "second or successive" one. *Id.*. This holding established beyond any dispute that the meaning of the term "second or successive" is not determined by mechanically counting the number of previous applications, but includes consideration of the res judicata principles underlying the abuse doctrine. *Id.*

Compared to *Martinez-Villareal*, Mr. Slack's case is straightforward. No form of res judicata can apply in the absence of a prior adjudication, and to accept the holding of the lower courts in this case would shift the "second or

successive" focus from the federal merits adjudication – where the Court has said for the past century that it belongs – to an initial federal filing that is dismissed without prejudice. There is no precedent for such a ruling and indeed, in *Martinez-Villareal*, every member of the Court appeared to acknowledge that Mr. Martinez-Villareal's three pre-adjudication dismissals for exhaustion had no preclusive effect on the litigation. *See Martinez-Villareal*, 118 S.Ct. at 1621; *id.* at 1623 (Scalia, J. dissenting) (referring to "second-time collateral federal review"); *id.* at 1625 (Thomas, J. dissenting) (as to earlier dismissals without prejudice for exhaustion, "it could be argued that th[os]e petition[s] should be treated as if [they] had never been filed. In contrast, when a court addresses a petition and adjudicates some of the claims presented in it, that petition is certainly an 'application,' and any future application must be 'second or successive.' ") Such a holding is implicit, in fact, in the majority opinion because if any of the pre-adjudication filings had been "second or successive" then the Court would not have had jurisdiction to act.

In short, Mr. Martinez-Villareal's petition was not "second or successive" because he could not have obtained an adjudication of the *Ford* claim in the previous proceeding; but Mr. Slack's current petition cannot be "second or successive" for an even more basic reason: no federal adjudication has ever occurred, and "it is certain" that in the absence of such a federal adjudication, Mr. Slack's current petition "would not be barred under any form of res judicata." *Martinez-Villareal*, 118 S.Ct. at 1622. The lower courts accordingly applied a "form of res judicata" to Mr. Slack's case that has no principled basis whatsoever.

The significance of *McCleskey* is that it incorporates, through the abuse of the writ doctrine, the same bright-line rules of preclusion for habeas practice that apply in all other areas of the civil law. In this case, the Court should "evenhandedly apply" these res judicata rules, *see Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), by holding that this clear, established doctrine applies to habeas

cases the same way it does to all other cases: No preclusive effect can attach in the absence of a prior merits adjudication. This Court's rulings in *Martinez-Villareal*, *McCleskey*, and *Rose v. Lundy*, combine to compel this conclusion.

C. The Lower Courts' Consistent Construction Of The Term "Second Or Successive" Demonstrates That A "Second Or Successive" Application Is One Filed After A Previous Merits Adjudication.

Consistent with exhaustion and abuse of the writ principles discussed above, the lower courts outside the Ninth Circuit have uniformly held that no application filed after an earlier dismissal without prejudice for lack of complete exhaustion can be "second or successive." The definition of "second or successive" application is the same under Rule 9(b) and former 28 U.S.C. § 2244 as it is under AEDPA. *E.g.*, *In re Gasery*, 116 F.3d 1051, 1502 (5th Cir. 1997) (per curiam). The term "second or successive" is a term of art, *e.g.*, *Shepeck v. United States*, 150 F.3d 800, 800 (7th Cir. 1998) (per curiam), and by using the term in AEDPA Congress is presumed to have used the term to mean the same thing it did under Rule 9(b).[8] The uniform recognition that a petition filed after a previous dismissal without prejudice for exhaustion is not a "second or successive" application, both before and after the enactment of AEDPA, further demonstrates that the Ninth Circuit rule is outside the "evolutionary" development of habeas doctrine referred to in *Lonchar* and *McCleskey*. *See generally*, 2 James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 28.3(b) at 1167-1170 (3d. ed. 1998).

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[8] Congress could not have intended to adopt the construction of the term "second or successive" used in *Farmer*, since *Farmer* was decided after AEDPA was enacted. 98 F.3d at 1548.

1. Pre-AEDPA Cases.

Prior to the passage of AEDPA, the lower courts addressed the effect of exhaustion dismissals and concluded that the enforcement of the exhaustion doctrine did not divest the federal courts of the ability to adjudicate claims in a post-exhaustion petition on abuse of the writ grounds. One Court of Appeals summed up the situation simply in *Woods v. Whitley*, 933 F.2d 321, 322 n.1 (5th Cir. 1991), explaining that where a first petition is dismissed without prejudice due to lack of complete exhaustion "we disregard it for purposes of abuse of the writ analysis." *Accord, Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en banc). Similarly, in *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990) (en banc), the Eighth Circuit focused on the lack of a prior federal adjudication in holding that "the district court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition."

In *Dellenbach v. Hanks*, 76 F.3d 820, 822 (7th Cir. 1996), the court held that, because a habeas petitioner's first filing was dismissed for lack of complete exhaustion, and the second was dismissed for want of subject matter jurisdiction, the trial court had erred in finding that the third filing constituted an abuse of the writ. Chief Judge Posner's analysis focused on the lack of a prior federal adjudication, and held that "it is not an abuse to file a successive petition if the previous petition or petitions were not denied on the merits," because "dismissal on the basis of a deficiency in the pleadings, rather than on the basis of an adjudication on the merits, [citations], is not a death knell" in habeas corpus practice. *Id.* at 822.

Dismissal for lack of complete exhaustion thus has always meant, under *Rose*, a dismissal "without prejudice"; and that "without prejudice" dismissal was "disregarded" for abuse of the writ purposes because it was not a merits adjudication of any part of the petition. Thus, before passage of

AEDPA, a "second or successive" application was defined as one filed after a previous federal adjudication.

. . .

2. Post-AEDPA Cases.

The "new restrictions on successive petitions," imposed by AEDPA require a prospective applicant to "file in the court of appeals a motion for leave to file a second or successive habeas application in the district court." *Felker*, 518 U.S. at 664; 28 U.S.C. § 2244(b)(2)(A). In performing their "gate-keeping" function under the new statute, the Courts of Appeals were quickly required to decide whether a federal habeas corpus application, filed after a previous petition had been dismissed without prejudice for lack of complete exhaustion, constituted a "second or successive" application. Consistent with the longstanding principle that "the law uses familiar legal expressions in their familiar legal sense," *Henry v. United States*, 251 U.S. 393, 395 (1920); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *Bradley v. United States*, 410 U.S. 605, 609 (1973), all of the circuits (including the Ninth) unanimously concluded, based on the consistent pre-AEDPA authority, that a federal petition filed after an earlier filing had been dismissed for lack of complete exhaustion is not a "second or successive" application, and that no appellate authorization was required for filing such a petition.

This issue was discussed at length in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996) (per curiam). There, the government had urged a construction of "second or successive application" that would have limited the habeas petitioner to those claims contained in the initial habeas corpus filing, which had been previously dismissed without prejudice. The Court of Appeals rejected this approach, explaining that "because application of the gatekeeping provisions to deny a resubmitted petition in cases such as this would effectively preclude any habeas review," such a holding "would conflict with the doctrine of writ abuse, as understood both before and after *Felker*." *Id.* at 46.

Just as petitioner Slack has argued above, the Second Circuit looked to this Court's exhaustion and abuse of the writ teachings for guidance. The court recognized that attaching no preclusive effect to the initial federal dismissal ultimately fosters those policies that underlie the exhaustion doctrine:

> It serves the interest in finality by discouraging piecemeal litigation and encouraging petitioners first to exhaust their state remedies and then to 'present the federal court with a single habeas petition.' *Rose v. Lundy*, 455 U.S. 509, 520 (1982). In addition, encouraging petitioners to exhaust their state remedies prior to seeking federal court review promotes harmony between the state and federal courts by allowing state courts to examine state convictions and correct constitutional errors in the first instance.

Id. at 46.

The Court then noted that other circuits had unanimously concluded, prior to AEDPA, that a petition filed after an earlier dismissal for lack of complete exhaustion was not an abuse of the writ, since that position was the only one consistent with this Court's teachings on the subject:

> When a petition is dismissed without prejudice for failure to exhaust, there is no federal adjudication on the merits. To foreclose further habeas review in such cases would not curb abuses of the writ, but rather would bar federal habeas review altogether.

Id. The Court of Appeals then concluded with a discussion of res judicata law:

> It is well established that a dismissal without prejudice has no res judicata effect on a subsequent claim. [Citations] Inasmuch as the new gatekeeping provisions are rooted in the writ abuse doctrine which is itself 'a qualified application of the doctrine of res judicata,' [citations], a dismissal without prejudice can have no preclusive effect on subsequent petitions. Indeed, the phrase "without prejudice" would be devoid of its meaning under any other construction of the amended § 2244.

Id. at 46-47.

Other circuits have unanimously agreed with the reasoning in *Camarano*. *In re Turner*, 101 F.3d 1323 (9th Cir. 1997);[9] *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996) (per curiam); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997) (noting that "prior to passage of the AEDPA, we consistently held that petitions that were refiled after dismissal for failure to exhaust state remedies were not 'second or successive' for Rule 9(b) purposes, and then agreeing with "the First, Second, Seventh, and Ninth Circuits . . . that a habeas petition filed after dismissal without prejudice for failure to exhaust is neither second nor successive."); *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997) ("when a prior petition has been

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[9] The Ninth Circuit simply followed *Turner* and *Camarano* when it issued the ruling this Court ultimately affirmed in *Martinez-Villareal*. As the Ninth Circuit explained, litigation of the previously-unadjudicated competence claim was required precisely because the earlier dismissal without adjudication on the merits was analytically controlled by the exhaustion precedents:

> We conclude . . . that the rationale underlying *Turner* applies with equal force to Martinez-Villareal's competency claim. Just as we must dismiss petitions containing unexhausted claims, we must dismiss a competency claim raised in a first petition because it will always be premature. Just as we dismiss unexhausted claims to permit state courts to pass first judgment on those claims, we dismiss a competency claim so that the state court may have the first opportunity to consider that claim once a warrant of execution has issued. And just as we permit an exhausted petition to be heard in federal court even after it had been dismissed previously as unexhausted, so too should we permit a ripe competency claim to be heard in federal court even after it had been dismissed previously as premature. *Turner* reached this result to ensure that a petitioner's federal claims are accorded one hearing in federal court. We now extend *Turner* to competency claims that previously were dismissed without prejudice as premature in order to ensure that such claims are likewise subject to federal review.

Martinez-Villareal v. Stewart, 118 F.3d 628, 632-633 (9th Cir. 1998) (per curiam).

dismissed without prejudice for failure to exhaust state remedies . . . the petitioner may file his petition in the district court as if it were the first such filing," based on the uniform pre-Act law, and importance of "giving the state courts the first opportunity to review state convictions and to correct constitutional errors."); *Carlson v. Pitcher*, 137 F.3d 416, 419-420 (6th Cir. 1998) ("universal approach" before and after AEDPA that "a second-in-time habeas petition was not dismissed as an abuse of the writ when its filing followed a dismissal of the first-in-time petition on exhaustion grounds."); *In re Wilson*, 142 F.3d 939, 940 (6th Cir. 1998); *McWilliams v. State of Colorado*, 121 F.3d 573, 575 (10th Cir. 1997)

In *Benton v. Washington*, 106 F.3d 162, 164 (7th Cir. 1996), the Seventh Circuit rejected a definition of "second or successive" petition that would include prior petitions dismissed for failure to exhaust, reasoning:

> [t]he sequence of filing, dismissal, exhaustion in state court, and refiling in federal court might generate multiple docket numbers, but it would not be right to characterize it as successive collateral attacks. The prisoner launched a single campaign; that skirmishes were spread across several years and two forums would not make it apt to call any of the steps a 'successive' collateral attack.

In sum, the decision in this case, and the eccentric decision in *Farmer* on which it is based, stand alone. Every other Court of Appeals that has ever addressed the question has concluded that a habeas corpus petition filed after a "without prejudice" dismissal for lack of complete exhaustion is not a "second or successive" application, and that is the only conclusion consistent with this Court's reasoning in *Martinez-Villareal* and *McCleskey*. The contrary Ninth Circuit decision here is inconsistent with "formal judicial, statutory, or rules-based doctrines of law," *Lonchar*, 517 U.S. at 323-324, and it must be rejected.

D. The *Farmer* Decision And The Consequent Ruling Below Ignore This Court's Exhaustion And Abuse Of The Writ Teachings, And The Eccentric Definition Of "Second Or Successive" Applications They Apply Leads To Absurd And Unconstitutional Results.

The Ninth Circuit's opinion in *Farmer*, and the consequent ruling in this case, ignored the "evolving body of equitable principles informed and controlled by historical usage, statutory developments and judicial decisions," *McCleskey*, 499 U.S. at 489, by failing to take into account the res judicata basis of preclusion principles and the non-preclusive effect of a "without prejudice" dismissal for exhaustion. Because of this, the *Farmer* rule is based on a faulty, incomplete analysis of the controlling law, and it also fails to consider the absurd and unconstitutional results that that analysis will inevitably generate, including the one in this case.

1. The Ninth Circuit Applied Faulty And Incomplete Reasoning In *Farmer*.

The Ninth Circuit in *Farmer* based its analysis upon a narrow and distorted parsing of Rule 9(b), taken out of the context of the rule and its historical antecedents, and disregarding normal principles of statutory construction. Rule 9(b) applies by its terms to "second or successive" petitions and, as shown above, that term has been universally construed to exclude petitions filed after a dismissal without prejudice for exhaustion. The *Farmer* court focused, however, on the fact that the first clause of the rule refers to a "prior determination on the merits," while the second clause does not explicitly refer to a prior adjudication but uses the term "abuse of the writ." *Farmer*, 98 F.3d at 1555. The *Farmer* court viewed this supposed textual distinction as implicitly overruling the portions of the statute, former 28 U.S.C. § 2244(b), which explicitly refer to a prior "evidentiary hearing on the merits," or a "hearing on the merits of an issue of law," as the basis for a

district court to refuse to consider a subsequent application. *Farmer*, 98 F.3d at 1555.

Purely as a matter of textual analysis, the *Farmer* court's conclusion is not supported by the language of Rule 9(b) because there is an obvious reason why the first clause refers to a "prior determination on the merits" while the second one does not. The first clause of Rule 9(b) deals with new petitions raising the same claims as those raised in a previous petition, and it thus makes sense that this clause refers to a previous adjudication of the same claim as a basis for refusing to consider it again. But the second clause deals with new claims, which by definition would not have been the subject of a previous adjudication, and there would be no reason to refer to a prior adjudication in the rule. Thus the omission of a reference to a prior adjudication in the second clause does nothing to support reading the limitation of the rule to "second or successive" petitions out of that portion of Rule 9(b).

The *Farmer* court's reading of the rule also violates basic principles of statutory construction. Statutes and rules in pari materia should be harmonized if possible and an implicit repeal of a statute by adoption of an inconsistent rule should not be found if a reasonable harmonizing construction is available. *E.g.*, *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (per curiam). Former 28 U.S.C. § 2244(b) provided explicitly for dealing with a "subsequent application" for habeas relief, and the statute made it clear – as to both same-claim successive petitions and new-claim second petitions – that the restrictions on considering subsequent applications arose only after an adjudication of a previous petition. As Justice Thomas pointed out in *Stewart v. Martinez-Villareal*, "[c]laims presented in a petition dismissed for failure to exhaust are neither 'determined' nor 'adjudicated.' " 118 S.Ct. at 1625 (Thomas, J., dissenting). The statute and Rule 9(b) can easily be harmonized by recognizing that the "abuse of the writ," which is referred to in the Rule, is the same as the "abuse of the writ," following the adjudication of a prior petition, referred to in former 28 U.S.C. § 2244(b).

The *Farmer* court also ignored the principle that a statute must be interpreted in light of the harm it was meant to address. *E.g.*, *United States Nat. Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 455 (1993). The Advisory Committee Notes to Rule 9(b) make it clear that the rule was meant to address the problems raised by filing a habeas application after a previous petition has been decided on the merits. The Notes refer to the situation when:

> A successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. A known ground may be deliberately withheld in the hope of getting two or more hearings or in the hope that delay will result in witnesses and records being lost.

28 U.S.C. foll. § 2254, 28 U.S.C.A. at 800 (1994). The Advisory Committee Notes thus support the conclusion that, consistent with all other interpretations of "abuse of the writ," the reference to "second or successive" applications in Rule 9(b) applies only to applications filed after a previous petition has been adjudicated; and it is this interpretation of Rule 9(b) through which the *McCleskey* Court brought the abuse doctrine substantially into line with general res judicata principles.

Also in the context of the harm the provision is designed to address, the *Farmer* court's reading of Rule 9(b) would apply in situations in which there is no conduct on the part of the petitioner that could be remotely described as "abusive" in the way that deliberately withholding a claim, *see* former 28 U.S.C. § 2244(b), or presenting a previously adjudicated petition to a new judge in the hope of obtaining a different result, *see* Advisory Committee Notes, 28 U.S.C.A. at 800, or litigating an entire round of federal habeas proceedings before asserting a known claim, *see McCleskey*, 499 U.S. at 490,

would be.[10] This case is a good example. Here, Mr. Slack tried to do what *Rose v. Lundy* and the district court told him to do: he exhausted his available remedies as to claims he knew about and returned to federal court to litigate those claims. Characterizing this conduct as abusive would deprive that term of any rational meaning. *Cf. Lowe v. Pogue*, ___ U.S. ___, 119 S.Ct. 1238 (1999) (per curiam) (describing 31 patently frivolous filings as "abuse" of Supreme Court's certiorari and extraordinary writ process).

The Ninth Circuit's limitation of reviewable claims to those contained in the initial, dismissed petition imposes enormous consequences on the basis of a distinction that simply will not bear the load. Before his initial petition was dismissed without prejudice, Mr. Slack informed the federal district court that there were additional unexhausted claims outside the petition that he wanted to assert; and solely because those claims were not included in the dismissed and superseded initial petition, those claims were subjected to the Ninth Circuit's preclusion rule. If the unexhausted claims had been pleaded in the dismissed petition rather than drawn to the court's attention by motion, apparently the Ninth Circuit rule would not preclude their consideration; but there is no rational distinction between the two situations in terms of the burden on the federal court or the effect of the dismissal of a petition without prejudice that would justify so drastic a difference in treatment.[11] Basing application of the abuse of

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[10] The statutory construction rules eiusdem generis and noscitur a sociis would lead to the same conclusion. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995); *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991). In former 28 U.S.C. § 2244(b), "abuse of the writ" is classed with deliberate withholding of a claim, and abuse should thus be interpreted to apply to the same kind of conduct. *See also, Sanders v. United States*, 373 U.S. 1, 18 (1963) (abuse of writ when petitioner conducts litigation "whose only purpose is to vex, harass, or delay").

[11] This case supplies a clear example of the unworkability of this aspect of the *Farmer* rule. The district court, on the state's motion, dismissed one claim (which had been presented in the 1991 filing) without prejudice because it had been defectively exhausted in the state proceedings, while it dismissed other claims with prejudice, on the ground of abuse of the writ. JA 155-158. There is no rational basis for concluding that the federal habeas proceedings are being "abused" by presenting the latter claims, which are ripe for adjudication, but not by presenting the former one.

the writ doctrine on such a distinction trivializes the doctrine itself and the orderly process of habeas litigation of which it is a part.

Moreover, imposing a straitjacket on further proceedings based on an initial, dismissed habeas petition can irrationally compromise the effectiveness of the state exhaustion proceedings. Enforcement of the exhaustion doctrine is designed to "channel claims into the more appropriate forum," *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992), and state court litigation may disclose additional, previously unknown claims.[12] But if a petitioner discovers such claims in the state proceedings "where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court," *id.*, he or she cannot obtain federal review of them because, if they were not in the initial federal petition, the Ninth Circuit preclusion rule will bar their consideration. Thus the Ninth Circuit rule not only distorts the federal proceedings, but it may also deform the state exhaustion proceedings themselves by removing a major incentive – the prospect of eventual federal review – for discovering and asserting all the available claims in the state exhaustion proceedings. There is no shred of evidence that the enactment of Rule 9(b) was intended to cause such a result.

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[12] Although Mr. Slack was not given any assistance in his state exhaustion proceedings, despite his request, Nevada courts do have the power to appoint counsel and provide discovery in post-conviction proceedings. Nev. Rev. Stat. §§ 34.750, 34.780.

2. The Ninth Circuit's Rule Will Inevitably Generate Absurd And Unconstitutional Results, Such As The One In This Case.

The Ninth Circuit's interpretation of a "second or successive" habeas corpus application under Rule 9(b) to include an application filed after a petition was dismissed without prejudice for exhaustion is also unsustainable because it would lead to absurd and unconstitutional results. *See, e.g., Edmond v. United States*, 520 U.S. 651, 658 (1997).

As shown above, the res judicata doctrine applies only if the party sought to be precluded had a constitutionally-adequate opportunity to litigate his or her claims in the previous proceeding. *See* pp. 25-26, above. The *Farmer* definition of "second or successive" application would bar Mr. Slack's claims, after he had no opportunity to litigate them in the previous proceeding, and that interpretation must therefore be rejected. Further, if the Ninth Circuit's ruling in this case is upheld, the preclusion of Mr. Slack's claims will also result in a suspension of the writ of habeas corpus, prohibited by Article I, Section 9, of the Constitution. Application of a res judicata rule to bar claims when there has been no previous adjudication of any previous application is far outside the evolutionary development of the abuse doctrine. *Cf. Felker v. Turpin*, 518 U.S. at 664. That rule results in the practical suspension of the writ as to those claims, which has no rational or historical foundation at all, and an interpretation that would lead to these results must be avoided.

Accepting the Ninth Circuit's definition of "second or successive" application would also lead to absurd consequences with respect to AEDPA. The finality provisions of 28 U.S.C. § 2244 apply to "second or successive" habeas corpus applications. The prohibition on entertaining the same claims raised in a previous petition imposed by 28 U.S.C. § 2244(a) is absolute; and the standard for entertaining a petition containing new claims imposed by 28 U.S.C. § 2244(b) is so high as to be practically insurmountable. If a petition filed after a previous petition is dismissed for exhaustion is a "second or

successive" one, under AEDPA the filing of a post-exhaustion petition would be an exercise in futility: any claims presented in the pre-exhaustion petition would be absolutely barred as "same claims" under 28 U.S.C. § 2244(a); and any claims not presented in the pre-exhaustion petition would be practically barred as "new claims" under 28 U.S.C. § 2244(b). Obliterating the entire habeas application as the price of complying with *Rose v. Lundy* is so absurd a consequence of the *Farmer* rule that it defies reasoned analysis.

The Ninth Circuit rule would create confusion in other provisions as well. For instance, in the expedited review provisions for capital cases under AEDPA, the tolling provision on the statute of limitations for filing the federal petition is limited to a "first" state post-conviction proceeding, 28 U.S.C. § 2263(b)(2), while the statute of limitations is tolled as to all other cases during the time any "properly filed" state post-conviction petition is pending. 28 U.S.C. § 2244(d)(2). This distinction would be unnecessary if the general provisions did not contemplate that an exhaustion proceeding pursuant to *Rose v. Lundy* might be used; but if a federal application filed after such an exhaustion proceeding would be barred as a "second or successive" one, the distinction made by the statute would be entirely superfluous.[13]

An additional absurdity would arise in the cases of habeas petitioners who seek relief from federal court because of the ineffectiveness of state remedies, as in *Brooks v. Jones*, 875 F.2d 30 (2d Cir. 1989). Petitioner Brooks was convicted of felonies in state court, and the state appellate court consumed eight years in completing the briefing on direct appeal

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[13] Interpreting "second or successive" petition as the *Farmer* court did would also render 28 U.S.C. § 2266(b)(3)(B) superfluous. That provision applies the res judicata standards of 28 U.S.C. § 2244(b) to bar a post-answer amendment to an application which is governed by the expedited review procedures applicable in some capital cases. If failure to include an unexhausted claim in an initial petition would bar post-exhaustion review on that claim as a "second or successive" application, under the *Farmer* definition, the bar on amendment would be redundant.

in his case. Brooks sought federal habeas relief, claiming that the appellate delay violated due process under the federal constitution, but his petition was dismissed without prejudice because of lack of complete exhaustion. On appeal, the Court of Appeals agreed that the delay violated due process, but in reversing the order of dismissal it directed the issuance of a conditional writ, providing for the petitioner's release only if his appeal was not heard within sixty days, based on the state's representation that the state appeal would be resolved forthwith. If the Ninth Circuit's interpretation of "second or successive" application is accepted, then any new petition filed by Mr. Brooks raising his substantive issues would have been subject to preclusion because of the filing of a federal petition that was necessary to have his state appeal heard in the first instance. Cases involving extreme and unconstitutional delays in state proceedings are not uncommon, *e.g.*, *Coe v. Thurman*, 922 F.2d 528, 530-31 (9th Cir. 1991); *Hill v. Reynolds*, 942 F.2d 1494, 1496 (10th Cir. 1991); *Elcock v. Henderson*, 902 F.2d 219 (2d Cir. 1990) (per curiam); *Burkett v. Cunningham*, 826 F.2d 1208, 1218-19 (3d Cir. 1987); and the application of Ninth Circuit's "second or successive" definition would place these petitioners in a truly Kafkaesque dilemma: if the inmate files a federal habeas petition in order to obtain the meaningful state court appellate review to which he or she is constitutionally entitled, *see Evitts v. Lucey*, 469 U.S. 387 (1985), the filing of that federal petition will bar any review of substantive claims, discovered in the course of the resulting state proceedings, which were not in the initial federal petition. Nothing in this Court's abuse of the writ jurisprudence supports such an absurd result.

Carried to its logical extreme, the Ninth Circuit's rule would also bar any amendment of a habeas petition. If the claims presented in an initial petition limit all subsequent litigation to those claims, and the presentation of any new claims not in that petition (regardless of the absence of any adjudication) constitutes a "second or successive" application, then any pre-adjudication attempt to amend a habeas

petition would also be barred under the abuse doctrine. This result should not occur, of course, because 28 U.S.C. § 2242 explicitly provides that an application for habeas corpus relief "may be amended or supplemented as provided in the rules of procedure applicable to civil actions;" and there is no provision of civil law which equates a pre-adjudication amendment of a pleading with a new action that is commenced following an adjudication and which is subject to the res judicata doctrine. *See, e.g.*, Fed. R. Civ. P. 15(a) (amendment of complaint as of right before filing of answer and with leave of court thereafter); *cf. Bonin v. Vasquez*, 999 F.2d 425, 427 (9th Cir. 1993) (approving application of abuse of the writ standards to post-judgment motion to amend under Fed. R. Civ. P. 60(b)); 28 U.S.C. § 2266(b)(3)(B) (limitation on amendment of habeas petition after answer under expedited capital procedures). But the concern that the Ninth Circuit's preclusion rule could be applied to bar even an amendment of a pending petition is not fanciful, because one district court in the Ninth Circuit has done exactly that. In *Anthony v. Cambra*, 21 F.Supp.2d 1094, 1095-96 (N.D. Cal. 1998), the district court held a habeas petition in abeyance to allow the petitioner to exhaust his state remedies as to some claims. Following exhaustion proceedings, the Court refused to allow the petitioner to amend the pending, unadjudicated petition to include the exhausted claims, on the basis of the *Farmer* rule. *Cf. Martinez-Villareal*, 118 S.Ct. at 1624 (Scalia, J., dissenting) (distinguishing between cases in which district court holds petition in abeyance and those in which petition dismissed).

It is consistent with general principles to recognize that a habeas application which is dismissed without prejudice has no effect on subsequent proceedings: like an initial pleading which is subsumed by an amended one, *e.g.*, *Robinson v. Willow Glen Academy*, 895 F.2d 1168, 1169 (7th Cir. 1990), an initial habeas application dismissed without prejudice is superseded by a new application. *See Stewart v. Martinez-Villareal*, 118 S.Ct. at 1625 (Thomas, J., dissenting). Since

the initial application has no significance in the new proceeding, the post-exhaustion petition is the "first" federal habeas petition; and every member of this Court has agreed that the abuse of the writ doctrine simply does not apply to a first petition. *Lonchar v. Thomas*, 517 U.S. at 330-331; *id.* at 341 (Rehnquist, C.J., concurring in judgment) ("a first habeas petition may not be dismissed on the basis of the abuse of the writ," and there is "no other ground under which to dismiss a first petition other than the merits"). The consistent construction of "second or successive" application by this and other courts offers a reasonable alternative that avoids the unconstitutional and absurd results produced by the Ninth Circuit rule. This court should accordingly adhere to the universally-accepted definition of "second or successive" application and bring the Ninth Circuit into line with this Court's abuse of the writ jurisprudence.

E. Current Rules, Statutes And Judicial Doctrines Provide The District Courts With Ample Authority To Tailor The Proceedings To Prevent Misuse Of The Exhaustion Process.

The Ninth Circuit's attempt to deviate from "formal judicial, statutory, or rules-based doctrines of law" cannot survive in light of the holding in *Lonchar*. But just as in *Lonchar*, "this is not to say that a district court has no discretion," 517 U.S. at 325, in dealing with any perceived problems arising from the necessity of dismissing habeas petitions for exhaustion.

It is clear that no such problems are presented here, because Mr. Slack plainly has not engaged in any behavior the Ninth Circuit's rule could legitimately be designed to prevent. Mr. Slack had no incentive to delay adjudication by the federal court of the claims asserted as to the validity of his conviction and life sentence, and there is nothing in this record that even suggests that he engaged in intentional delay. But where a district court is faced with what it believes to be misuse of the exhaustion procedures, current rules, statutes

and judicial doctrines provide ample authority to prevent such misconduct, without deforming the clear, bright line rules on exhaustion and abuse of the writ that this Court has developed over the past century.

First, a district court had discretion, under pre-AEDPA law, to summarily deny on the merits claims that are obviously without merit, even if they appear in a mixed petition. *See Granberry v. Greer*, 481 U.S. 129, 134-135 (1987); *Bailey v. Crowley*, 914 F.2d 1438, 1439 n.1 (9th Cir. 1990) (per curiam). A court faced with a petition that has been "mixed" by the addition of patently unmeritorious claims can thus defeat an attempt to induce a round of exhaustion proceedings intended merely for delay by summarily denying those claims. That power has now been explicitly codified by AEDPA. 28 U.S.C. § 2254(b)(2).

Second, the Federal Rules of Civil Procedure provide a district court with the power to condition a dismissal without prejudice on the petitioner's proper use of the exhaustion process. Under Rule 41(a)(2) of the Federal Rules of Civil Procedure, the district court can condition a dismissal without prejudice at the request of the plaintiff "upon such terms and conditions as the court deems proper." A district court could simply make it a condition of the dismissal-without-prejudice order that any renewed federal petition must contain only exhausted claims, and that any unexhausted claims in such a later petition would not be entertained absent extraordinary circumstances. Such an order would be "proper" because it would be consistent with the purposes of the exhaustion doctrine, and it would clearly be enforceable under Rule 41(b), which allows involuntary dismissal on the merits for failure to comply with "any order of court." *See, e.g., Stern v. Inter-Mountain Tel. Co.*, 226 F.2d 409, 409 (6th Cir. 1955) (per curiam) (failure to comply with conditions of voluntary dismissal grounds for involuntary dismissal with prejudice); *Mobley v. McCormick*, 160 F.R.D. 599, 601-602 (D. Colo. 1995) (failure to comply with court orders grounds for involuntary dismissal with prejudice), *affirmed* 69 F.3d 548 (10th

Cir. 1995); *see also Calderon v. United States District Court (Thomas)*, 144 F.3d 618 (9th Cir. 1998) (district court has discretion to dismiss unexhausted claims in petition and hold remainder of petition in abeyance pending completion of exhaustion proceedings). This method of conditional dismissal removes the prospect of repeated dismissals for exhaustion, without deforming the definition of a "second or successive" petition beyond the res judicata principles recognized in this Court's precedents, and it also would not compromise the effectiveness of the state court exhaustion proceedings.

Third, under pre-AEDPA law, Rule 9(a) can be applied to prevent a petitioner from engaging in intentional manipulative delay in filing a habeas application by allowing dismissal with prejudice when that delay has resulted in prejudice to the state's ability to respond to the petition. *Cf. Lonchar*, 517 U.S. at 321 (no application of Rule 9(a), despite apparently manipulative delay, where no prejudice to state alleged). Under AEDPA, that problem should not arise because of the one-year statute of limitations imposed by 28 U.S.C. § 2244(d)(1).

Fourth, although Nevada has not imposed clearly-established, independent, categorical procedural bars to successive state collateral review,[14] federal courts that sit in states which have adopted such impediments to review can prevent multiple exhaustion dismissals through the anticipatory application of those default rules. Under *Castille v. Peoples*, 489 U.S. 346, 351-52 (1989), a federal court need not dismiss a mixed petition where "it is clear that [the petitioner's otherwise unexhausted] claims are now procedurally barred under

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[14] *See Glauner v. State*, 107 Nev. 482, 813 P.2d 1001 (1991) (per curiam) (no statute of limitations in collateral proceedings); *Pertgen v. State*, 110 Nev. 554, 875 P.2d 361, 364 (1994) (per curiam) (Nevada courts examine merits of constitutional claim to determine if procedural bar applies); *compare McKenna v. McDaniel*, 65 F.3d 1483, 1488-89 (9th Cir. 1995), *with Moran v. McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996).

[state] law," because "a habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Thus, where a clear state procedural rule would indisputably bar a habeas petitioner's unexhausted claims, a federal court can proceed immediately to adjudication without requiring additional state court exhaustion proceedings. *See* fn. 6, above.

The district courts accordingly have ample and adequate means to deal with any problem which could arise as a result of repeated dismissal for exhaustion proceedings when the petitioner is acting merely to delay adjudication of the petition. To the extent that the Ninth Circuit sought to solve that problem by adopting an idiosyncratic definition of "second or successive" petition – a definition which is inconsistent with established res judicata and exhaustion principles and which has been rejected by every other court that has addressed the issue – its action was unnecessary in practice as well as impermissible under *Lonchar*.

VIII.

CONCLUSION

This Court should vacate the order of the Court of Appeals for the Ninth Circuit and remand this case for further proceedings in accordance with a determination that a habeas corpus application cannot be treated as "second or successive," where the initial petition was denied without prejudice for failure to exhaust state remedies.

Respectfully submitted,

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Dated: April 21, 1999

APPENDIX TO BRIEF FOR PETITIONER

Rules Governing Section 2254 Cases, Rule 9. Delayed or Successive Petitions.

(a) **Delayed petitions.** A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) **Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Former 28 U.S.C. § 2244. Finality of determination.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge of court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to

appear in such record by the exercise of reasonable diligence.

Current 28 U.S.C. § 2244. Finality of determination.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but

for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

* * * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(9)

Supreme Court, U.S.
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CLERK

No. 98-6322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ANTONIO TONTON SLACK,

Petitioner.

v.

E. K. McDANIEL, Warden, Ely (Nevada) State Prison, and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

If a person's petition for habeas corpus under 28 U.S.C. §2254 is dismissed for failure to exhaust his state remedies and he subsequently exhausts his state remedies and refiles the §2254 petition, are claims included within that petition that were not included within his initial §2254 filing "second or successive" habeas applications?

I. STATUTORY PROVISIONS INVOLVED

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.

(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ.

II. STATEMENT OF THE CASE

On December 29, 1989, an information was filed in the Eighth Judicial District Court of the State of Nevada in and for Clark County (hereinafter Clark County District Court or state trial court) charging Petitioner Antonio Slack (hereinafter Slack) with Murder With the Use of a Deadly Weapon. Court Record (CR) 16 Exh. 3. On February 22, 1990, Slack was convicted, pursuant to a jury verdict, of Second Degree Murder With the Use of a Deadly Weapon. CR 16 Exh. 12. On May 23, 1990, a judgment of conviction was entered upon the trial court's sentence of life with the possibility of parole for Second Degree Murder and a consecutive term of life with the possibility of parole for the use of a deadly weapon. CR 16 Exh. 13.

Slack appealed his conviction to the Nevada Supreme Court claiming there was insufficient evidence adduced at his trial to convict him; state law improperly allowed evidence of a sexual relationship between Slack and the twelve-year-old victim; that the reasonable doubt jury instruction given at his trial violated the due process clause of the United States and Nevada Constitutions; and that the state trial court erred by not adequately defining premeditation in the jury instructions. CR 16, Exh. 20.

The Nevada Supreme Court dismissed Slack's appeal in an unpublished order, concluding that the evidence of the intimate relationship of Slack and the victim was properly admitted to refute Slack's credibility after he denied having a boyfriend/girlfriend relationship with the victim. CR 16, Exh. 22.

On November 27, 1991, Slack filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 by a Person in State Custody in the United States District Court for the District of Nevada. Joint Appendix (JA) 6-16. In that case, "his first federal petition", Slack raised the following issues: insufficient evidence was adduced at trial to convict him of Second Degree Murder; the state trial court improperly allowed prejudicial evidence of a sexual relationship between Slack and the twelve-year-old victim; the reasonable doubt instruction violated the

due process clause of the United States and Nevada constitutions; and the state trial court erred in not adequately defining premeditation in jury instructions regarding murder. *Id.*

Slack subsequently filed a motion to hold his first federal petition in abeyance so he could return to state courts and exhaust the following issues: ineffective assistance of counsel for failure to raise a *Franklin* violation in that the deal made with his co-defendant was not completed before he testified and for failure to offer and/or request an accomplice or informant instruction; the state trial court erred in not instructing the jury on an accomplice instruction and his testimony; the state trial court erred in allowing his co-defendant to testify prior to his deal with the State being completed; and prosecutorial misconduct, in that the prosecution withheld from the jury the fact that the only fingerprints found on the murder weapon were those of the co-defendants. JA 17-19.[1] On February 19, 1992, Slack's first federal petition was dismissed without prejudice so that he could exhaust his state remedies. JA 21-22.

[1] In *Franklin v. State*, 577 P.2d 860 (Nev. 1978), the Nevada Supreme Court held that plea negotiations with a testifying co-defendant had to be fully consummated before that co-defendant could testify. The court later overturned its ruling in *Franklin*. *Sheriff v. Acuna*, 819 P.2d 197 (Nev. 1991).

On July 10, 1992, Slack filed a petition for post-conviction relief in the Clark County District Court. CR 16, Exh. 31. In his petition, Slack claimed as ground one that he was denied the effective assistance of counsel at pre-trial and trial in that his counsel: 1) failed to find out what kind of deal was made with co-defendant Kamal Bey; 2) failed to file a pre-trial motion in limine to stop the introduction of prior evidence regarding his sexual relationship with the victim; 3) failed to file a pre-trial motion in limine to stop the testimony of Kamal Bey, as Bey's deal with the prosecution was contingent on his trial testimony; 4) failed to interview Slack's brother to refute the testimony of Kamal Bey; 5) failed to ask Kamal Bey what deals he made with the state for his testimony; 6) failed to request an accomplice instruction; 7) failed to have evidence presented to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey; and 8) that these alleged errors prejudiced him. *Id.*

As ground two, Slack claimed that he had ineffective assistance of counsel on his direct appeal in that his appellate counsel: 1) failed to raise a *Franklin* violation on appeal; 2) failed to raise the issue that counsel failed to request an accomplice instruction; 3) failed to raise the issue that Kamal Bey was a co-defendant and his testimony was questionable; and 4) failed to raise an issue of prosecutorial misconduct when

the prosecutor failed to inform the jury that Kamal Bey was a co-defendant as well as the fact that Bey's fingerprints were the only fingerprints found on the murder weapon. *Id.*

As ground three, Slack claimed that the state trial court deprived him of his rights under the Sixth and Fourteenth Amendments to a fair and impartial trial when the court failed to properly instruct the jury on accomplice testimony and premeditation. *Id.* As ground four, Slack claimed that the prosecutor committed misconduct by withholding evidence from the jury that the only fingerprints found on the murder weapon were those of Kamal Bey and that he was a co-defendant in the case. *Id.*

On February 11, 1993, the state trial court denied Slack's petition for post-conviction relief. JA 24-30. Slack appealed and on December 30, 1993, the Nevada Supreme Court dismissed his appeal. JA 31-34. The Nevada Supreme Court found that Slack's claims were repelled by the record. Specifically, the Nevada Supreme Court found the terms of the state's agreement with Bey were fully disclosed to the jury. The Court found that Slack's theory of the case was that he accidentally shot the victim and noted that Slack testified that his finger was on the trigger when the gun fired, therefore it was irrelevant that Bey's fingerprints were found on the weapon. The Nevada Supreme Court also found that Bey was neither an

accomplice nor a co-defendant and Slack was not prejudiced by the lack of an accomplice testimony instruction. The Court also noted that the remaining claims were similarly repelled by the record. *Id.*

On May 30, 1995, Slack filed his second federal petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. JA 35-47. The federal district court subsequently appointed counsel for Slack who submitted a third amended petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. JA 64-65 & 66-91.

In his third amended petition (hereinafter third amended petition) Slack alleged the following grounds for relief: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 2) Petitioner was denied his right to due process under the Fifth and Fourteenth Amendments because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him; 3) The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 4) The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the

U.S. Constitution;[2] 5) Petitioner was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution;[3] 6) Petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment;[4] 7) The doctrine of cumulative error mandates relief. JA 66-91.

Respondents moved to dismiss Slack's third amended petition, alleging that grounds two, three, four(c), five, six and seven were unexhausted. JA 99-103. Respondents also argued that grounds two, four(c), five, six and seven were not raised in Slack's first federal petition and constituted an abuse of the writ pursuant to *Farmer v. McDaniel*, 98 F.3d 1548 (1996) *cert. denied* 520 U.S. 1188 (1997). JA 103-110. The federal district court found that Respondents had met their burden in pleading abuse of the writ and that Slack had to demonstrate either cause and prejudice for failing to raise grounds two, four(c), five, six and seven in his prior federal petition, or demonstrate that a fundamental miscarriage of justice would occur if these claims were dismissed for abuse of the writ. JA 143.

Rather than attempt to overcome the abuse of the writ bar, Slack filed a motion for reconsideration arguing that he had not abused the writ. JA 145-150. The federal district court disagreed and dismissed grounds two, four(c), five, six and seven as abusive. JA 155-156. The federal district court also found that ground three of Slack's petition was unexhausted and therefore dismissed his petition. JA 157-158. The federal district court gave Slack the option of reopening the proceeding and abandoning his claim in ground three if he wished to continue in federal court with the remaining exhausted claims. JA 158-159.

Rather than proceed with his remaining exhausted claims only, Slack filed a notice of appeal. Both the district court and the circuit court denied Slack's request for a certificate of probable cause. JA 161, 182-183, & 197. This Court granted certiorari on February 22, 1999.

III. SUMMARY OF ARGUMENT

In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court set forth the requirement that a state prisoner filing a petition for

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[2] In ground four, Slack challenged the instructions given on reasonable doubt, premeditation and deliberation, and malice aforethought. Slack's challenge to the malice aforethought instruction is the part of ground four that was subsequently dismissed as abusive.

[3] Slack alleged his trial counsel was ineffective for: a) failing to take any action to prevent the introduction of evidence of sexual contact between Slack and his twelve year old victim; b) failure to object to the jury instruction on reasonable doubt; c) failure to object to the jury instruction on premeditation and deliberation; d) failure to object to the jury instruction on malice aforethought; and e) failure to investigate the facts of the case and develop available defenses.

[4] Slack alleged his appellate counsel was ineffective for: 1) failing to raise on direct appeal that his information did not sufficiently notify him of the charges and failing to challenge the malice aforethought instruction; and 2) for conceding at oral argument two of the four issues raised in his appeal.

writ of habeas corpus pursuant to 28 U.S.C. §2254 in federal district court must have fully exhausted his state court remedies for all claims contained in the federal petition. If the petition contains exhausted and unexhausted claims, the petition must be dismissed in order for the prisoner to exhaust his state court remedies. *Id.* at 522. However, there is nothing in this Court's opinion in *Rose* which supports the proposition that a state prisoner is entitled to multiple dismissals without prejudice when he returns to federal court with new unexhausted claims despite a previous dismissal without prejudice, granted for the purpose of allowing the petitioner to fully exhaust state court remedies.

In this case, Slack obtained one dismissal without prejudice to return to state court and exhaust several claims which he presented to the federal district court in his motion to hold his first federal petition in abeyance. JA 17-19, 21-22. Once he returned to federal court and initiated his second federal proceeding, Slack, through his attorney, raised five brand new, unexhausted claims. These claims were not presented in Slack's prior federal petition or in the state court proceedings which followed the dismissal of the first federal petition without prejudice. *See* JA 6-19, CR 16 Exh. 31. Slack's failure to raise these claims in his first federal petition constitutes an abuse of the writ.

In *Sanders v. United States*, 373 U.S. 1 (1963), this Court made it clear that a prior adjudication on the merits was not necessary before the doctrine of abuse of the writ could be applied. *Sanders* involved a second motion by a federal prisoner pursuant to 28 U.S.C. §2255. The lower federal court dismissed Sanders' motion for failing to raise his claims in his first motion despite the fact that the first motion was not denied on the merits. This Court reversed and remanded for an evidentiary hearing and stated that the respondents were free to raise the defense of abuse. *Sanders* at 21. This defense was available to the respondents even though this Court specifically found that Sanders' prior motion was not determined on the merits. *Sanders* at 19.

Rule 9(b) of the Rules Governing Section 2254 Cases in United States District Courts states:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b) codified this Court's reasoning in *Sanders*. Habeas Corpus Rule Advisory Committee Notes, 28 U.S.C.A.

foll. §2254, at 800. Pursuant to the express terms of the rule and this Court's holding in *Sanders*, a second petition containing new grounds does not need to follow a prior petition that was determined on the merits in order to constitute an abuse of the writ. The only requirements for such a petition are: 1) new and different grounds are alleged; and 2) the failure to assert those grounds in a prior petition constituted an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 1548 (1996), *cert. denied* 520 U.S. 1188 (1997).

The Ninth Circuit in *Farmer* held that a prior adjudication on the merits was not a prerequisite to the application of the doctrine of abuse of the writ. *Id.*. at 1557. The Ninth Circuit based its decision on the plain wording of Rule 9(b), this Court's opinion in *Sanders* and the Advisory Committee Notes to Rule 9(b). *Id.* at 1555-1556. The *Farmer* decision reached a result well within the formal, judicial and rules-based doctrines of law governing federal habeas corpus proceedings. *See Lonchar v. Thomas*, 517 U.S. 314 (1996).

The application of the abuse of the writ doctrine to new claims, regardless of whether a prior petition was adjudicated on the merits, is consistent with the principle that a habeas petitioner may not engage in piecemeal litigation. *See Rose v. Lundy*, 455 U.S. 509, 520 (1982). State respondents should not be required to appear in federal court time and again only

to have serial federal petitions dismissed for failure to exhaust state court remedies. The decision of the federal district court below should be affirmed by this Court.

IV. ARGUMENT

THE FEDERAL DISTRICT COURT PROPERLY DISMISSED SLACK'S NEW CLAIMS AS ABUSIVE

A. The Dismissal of Slack's New Claims as Abusive is Consistent with the Principles Underlying the Exhaustion Requirement in Federal Habeas Corpus Practice.

In his opening brief Slack argues that the exhaustion requirement governing federal habeas petitions under 28 U.S.C. §2254, set forth in this Court's decision in *Rose v. Lundy*, 455 U.S. 509 (1982), is designed solely to channel claims in the first instance into the state courts to ensure that state courts have the first opportunity to consider them. According to Slack a "doctrine intended to encourage petitioners to conduct thorough exhaustion proceedings simply cannot be advanced by precluding federal consideration of the claims which are exhausted." (Opening Brief, pg. 14-15).

Slack's argument ignores the fact that this case does not deal with the preclusion of properly exhausted claims. *O'Sullivan v. Boerckel*, __ U.S. __, __ S.Ct. __ (No. 97-2048, June 7, 1999). After one dismissal without prejudice, designed to allow Slack to fully exhaust state court remedies,

he returned to federal court and raised five unexhausted claims that had never appeared in any of his prior federal or state challenges to his conviction.[5] *See* JA 6-19, 66-91, CR 16 Exhs. 20 & 31.

In *Rose*, this Court set forth the principles underlying the exhaustion requirement:

> A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. . . . Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review. *Cf.* 28 U.S.C. §2254(d) (requiring a federal court reviewing a habeas petition to presume as correct factual findings made by a state court). . . .
>
> Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

Rose v. Lundy, 455 U.S. 509, 518-520 (1982).

The exhaustion requirement is not a rule of preclusion. However, it does set forth strict procedures a petitioner must follow prior to proceeding in federal court. Slack did not follow those procedures. Instead, Slack obtained a dismissal without prejudice to exhaust his state remedies and, rather than fully exhausting state remedies, he returned to federal court with new unexhausted claims. The exhaustion requirement does not grant petitioners the right to as many dismissals without prejudice as they wish. Indeed, such a result would enable petitioners to ping-pong back and forth between state and federal court *ad infinitum,* thereby increasing piecemeal litigation rather than reducing it. Nothing in *Rose* or any of the other exhaustion cases cited by Slack supports such a result.

Slack also argues that under the exhaustion requirement, federal courts have only two options: to either dismiss the petition without prejudice, or to adjudicate the

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[5] The question framed by this Court seems to indicate a belief that the claims dismissed as abusive were exhausted. That is not the case. Slack did not return to state court and exhaust the claims in grounds two, four(c), five, six and seven. In fact, these claims did not appear in any of Slack's challenges to his conviction until his appointed counsel filed his amended petition in his second federal proceeding. *See* JA 6-19, 35-48, 66-91, CR 16 Exhibits 20 & 31. Respondents noted this circumstance in their response to Slack's Petition for Writ of Certiorari. (Brief of Respondents in Opposition to the Petition for a Writ of Certiorari, pg. 8).

claims on the merits. Slack's argument is incorrect. Simply because claims are unexhausted does not mean that federal courts may not apply other affirmative defenses to those claims. For example, a petition may contain unexhausted claims but also be a delayed petition under Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. If the state respondents are able to demonstrate prejudice in fashioning a response, the federal court would be free to dismiss the petition under Rule 9(a). Indeed, dismissing such a petition without prejudice to exhaust state remedies and then allowing a return to federal court so that the claims may then be dismissed under Rule 9(a) would be absurd.

Slack has cited no authority, and Respondents are unaware of any, which requires a federal court to disregard or delay the application of an affirmative defense which would preclude either certain claims or the entire petition, simply because the claims in question are unexhausted. Such a practice would create unnecessary piecemeal litigation.

Slack, citing caselaw regarding FRCP 41(a), argues that a dismissal without prejudice does not operate as an adjudication on the merits and thus does not have res judicata

effect.[6] FRCP 41(a) provides that a plaintiff may voluntarily dismiss an action without prejudice prior to the time of service on an adverse party or before an adverse party has filed an answer. This Court has made it clear that a plaintiff is only entitled to one dismissal without prejudice under FRCP 41(a). *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990). In *Cooter & Gell*, this Court noted that FRCP 41(a) was designed to curb abuses of procedural rules which allowed dismissals or nonsuits right up to the entry of the verdict and to eliminate the practice of summoning the defendant in to court in successive actions. *Id.* This is exactly what the district court's application of Rule 9(b) to Slack's new claims accomplishes. Respondents should not be required to return to federal court time and again only to have the petition dismissed without prejudice for failure to exhaust state remedies.

Slack argues that the application of the abuse of the writ rule to his new claims violates due process because he did not have an opportunity to litigate his claims in his first federal habeas petition since they would have been unexhausted. However, Slack could have raised these claims in his first federal proceeding and returned to state court to exhaust them

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[6] Slack cites FRCP 41(b) in his brief. (Opening brief, pg. 20). This is apparently a typographical error since the case cited by Slack discusses FRCP 41(a), the rule that concerns dismissals without prejudice.

just as he did with his other claims. Additionally, Slack could not litigate his abusive claims in his second federal petition because they were unexhausted. *O'Sullivan.*

According to Slack, the answer to the question posed by this Court is that where a person's petition for habeas corpus under 28 U.S.C. §2254 is dismissed for failure to exhaust state remedies, and he subsequently exhausts his state remedies and refiles the §2254 petition, the earlier "without prejudice" dismissal can have no preclusive effect. The key words in this Court's question are "*subsequently exhausts his state remedies*". Slack did not exhaust the claims the district court dismissed as abusive. Under Slack's argument he would be entitled to another dismissal without prejudice to return to state court to exhaust his state remedies. Slack's view would result in his return to the state courts and, presumably, a third separate filing in federal court. At that time, if he raised even more unexhausted claims, under Slack's logic he would apparently be entitled to a third dismissal without prejudice. In short, under the rule championed by Slack and his supporting amici curiae, he would be allowed to hail the State of Nevada into federal court numerous times with impunity.

Such a result strikes at the very object of criminal law, the finality of its judgments. *See McClesky v. Zant*, 499 U.S. 467, 491 (1991). It also places an even heavier "burden on

scarce federal judicial resources and threatens the capacity of the system to resolve primary disputes." *Id*

It does not violate due process to require a habeas petitioner to raise all claims in an initial federal petition even if it is dismissed without prejudice to exhaust state remedies. If a petitioner subsequently discovers new claims, which could not have been discovered previously and raised during subsequent state court proceedings, he will have the opportunity to demonstrate to the federal courts cause and prejudice to overcome the abuse of the writ bar. Any other rule would allow a habeas petitioner to ping-pong back and forth between state and federal court by simply obtaining serial dismissals without prejudice to exhaust state remedies.[7] Such a result has no support in the law and should not be countenanced by this Court.

B. The Application of the Abuse of the Writ Doctrine Does Not Require a Prior Adjudication on the Merits.

Slack argues that the abuse of the writ doctrine cannot be applied to Slack's new claims because his prior federal petition was not determined on the merits. According to Slack, because the doctrine of res judicata requires a prior

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[7] Serial dismissals without prejudice are more frequent in capital cases where the petitioner has more of an incentive to delay the disposition of his sentence. However, such dismissals are a serious drain on the resources of both the Respondent and the courts, even in noncapital cases. The *Farmer* rule solves this problem in both capital and noncapital cases.

adjudication on the merits in order to preclude a subsequent action, the abuse of the writ doctrine must require a prior determination on the merits. Therefore, Slack argues, there is a bright line rule that gives preclusive effect to a prior federal adjudication as opposed to a prior dismissal without prejudice. Slack's argument ignores the fact that "[r]es judicata as such does not apply in habeas proceedings..." *Hill v. Lockhart*, 877 F.2d 698 (8th Cir. 1989) *aff'd on rehearing* 894 F.2d 1009 (8th Cir. 1990). Rather, the abuse of the writ doctrine is a qualified application of the doctrine of res judicata. *See McCleskey v. Zant*, 499 U.S. 467, 487 (1991).

Slack's argument also does not take into account this Court's decision in *Sanders v. U. S.*, 373 U.S. 1 (1963). In *Sanders*, the petitioner filed a motion under 28 U.S.C. §2255 challenging his sentence but alleging bare conclusions with no supporting facts. The federal district court denied the motion on the ground that it set forth no facts to support the conclusions. Sanders then filed a second motion, this time alleging specific facts. The federal district court denied the second motion without a hearing because the petitioner did not raise his factual allegations in his first motion. *Sanders* at 5-6. This Court reversed, holding that the statute required a hearing on a motion which alleges sufficient facts to support a claim for relief.

This Court first discussed the development of caselaw governing successive applications and then distinguished between successive motions on grounds previously heard and determined, and successive applications claimed to be an abuse of remedy. *Id.* at 15-17. As for successive motions on grounds previously determined this Court stated:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. . . .
>
> (2) The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application *See Hobbs v. Pepersack*, 301 F.2d 875 (C.A. 4th Cir., 1962). This means that if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held. *See Motley v. United States*, 230 F.2d 110 (C.A. 5th Cir., 1956); *Halloween v. United States*, 197 F.2d 926 (C.A. 5th Cir., 1952).
>
> (3) Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground.

Sanders at 15-16.

As for successive applications claimed to be an abuse of the remedy, this Court stated:

> No matter how many prior applications for federal collateral relief a prisoner has made, the principle elaborated in Subpart A, supra, cannot apply if a different ground is presented by the new application. So too, it cannot apply if the same ground was earlier presented but not adjudicated on the merits. In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading.

Id. at 17.

Therefore, in *Sanders*, this Court made a clear distinction between successive petitions following a petition that was determined on the merits and successive petitions following a petition that was not determined on the merits. It was the latter petition which was subject to the abuse of the writ bar. This is further supported by this Court's application of the foregoing principle to *Sanders* case:

> Petitioner's first motion under §2255 was denied because it stated only bald legal conclusions with no supporting factual allegations. The court had the power to deny the motion on this ground, see *Wilkins v. United States*, 103 U.S.App.D.C. 322, 258 F.2d 416 (1958), although the better course might have been

> to direct petitioner to amend his motion, see *Stephens v. United States*, 246 F.2d 607 (C.A. 1[0th] Cir., 1957) (per curiam). But the denial, thus based, was not on the merits. It was merely a ruling that petitioner's pleading was deficient. . . .
>
> On remand, a hearing will be required. . . . Also it will be open to the respondent to attempt to show that petitioner's failure to claim mental incompetency in his first motion was an abuse of the motion remedy, within the principles of *Wong Doo* and *Price v. Johnston*, disentitling him to a hearing on the merits.

Sanders at 19-21.

This Court's opinion in *Sanders* makes it clear that a prior adjudication on the merits is not necessary for a finding that new claims raised in a successive petition constitute an abuse of the writ.

This Court's reasoning in *Sanders* was codified in Rule 9(b). The Advisory Committee Notes to Rule 9(b) state:

> Subdivision (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable. . . .

With reference to a successive application asserting a new ground or one not previously decided on the merits, the Court in *Sanders* noted:

> In either case, full consideration of the merits can be avoided only if there has been an abuse of the writ . . . and this the Government has the burden of pleading. . .
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application . . . he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

373 U.S. at 17-18.

> Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

Habeas Corpus Rule, Advisory Committee Notes, 28 U.S.C.A. foll. §2254, at 799-800.

Both *Sanders* and the Advisory Committee Notes confirm that when new claims are alleged in a second petition, a prior adjudication on the merits is not necessary for a finding of abuse of the writ.

Further, even under the doctrine of res judicata a litigant was not entitled to conduct his case in a piecemeal fashion:

> "[A] party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a

> judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 320 (1927), quoting *Stark v. Starr*, 94 U.S. 477, 485 (1876).

In this case, Slack presented challenges to his conviction in a piecemeal manner. The presentation of brand new, unexhausted claims in Slack's third amended federal habeas petition merely creates additional litigation. Requiring Respondents to appear and respond in a second federal proceeding only to have that proceeding dismissed without prejudice for a second time due to unexhausted claims strikes at the finality of state convictions and constitutes an abuse of the writ.

Slack next cites this Court's decision in *Stewart v. Martinez-Villareal*, ___ U.S. ___, 118 S.Ct. 1618 (1998), in support of his argument. In *Martinez-Villareal*, this Court stated that the petitioner's claim, under *Ford v. Wainwright*, 477 U.S. 399 (1986), that he was incompetent to be executed, could be raised in a second and successive petition because it was not ripe for adjudication when it was raised in a prior petition.

In *Martinez-Villareal*, this Court stated:

> Later, in *Rose v. Lundy*, 455 U.S. 509, 522, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982), we went further and held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." But none of our cases expounding this doctrine have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

Martinez-Villareal at 1622.

In this case, Slack's first federal petition was dismissed in order for him to exhaust state remedies. Slack returned to state courts and raised the claims he had pleaded in his first federal petition. Slack then returned to federal court and through his attorneys, filed an amended successive petition raising brand new, unexhausted grounds. It was Slack's new, unexhausted grounds which the federal district court properly found constituted an abuse of the writ pursuant to Rule 9(b).

The facts of this case are materially different from the facts of the *Martinez-Villareal* case. The holding in *Martinez-Villareal* was based on the temporal relationship of petitioner's mental capacity to be executed vis-a-vis the time he filed his

successive petition. This Court's opinion in *Martinez-Villareal* simply does not apply to Slack's case. There is nothing in this Court's opinion in *Martinez-Villareal* which suggests that a federal court may disregard this Court's opinion in *Sanders v. United States*, 373 U.S. 1 (1963) and the dictates of Rule 9(b), and allow a petitioner to ping-pong back and forth between federal and state courts constantly raising new unexhausted claims which were readily available when he first appeared in federal court.

C. The Caselaw Cited by Slack does not Demonstrate that a Prior Adjudication on the Merits is Necessary for a Finding of Abuse Under Rule 9(b).

Slack argues that lower courts outside the Ninth Circuit have uniformly held that no application filed after an earlier dismissal without prejudice can be second or successive and therefore abusive under Rule 9(b). Slack has split his analysis between cases decided prior to the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) and cases decided after the enactment of the AEDPA.

Slack first points to the Fifth Circuit's decision in *Woods v. Whitley*, 933 F.2d 321 (5th Cir. 1991). *Woods* involved an abuse of the writ analysis regarding the petitioner's third federal habeas petition. Woods' first federal petition was dismissed for failure to exhaust state remedies

and the second federal petition was decided on the merits. *Woods* at 322. Apparently, Woods returned to federal court with fully exhausted claims in his second petition. Woods third federal petition was denied as an abuse of the writ. *Woods* at 324-325.

Slack next cites *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1990), stating the Eighth Circuit focused on the lack of a prior federal adjudication in holding that the district court did not abuse its discretion in hearing Hill's second federal petition. However, Hill's second federal petition contained the same claims as his first federal petition. *Hill v. Lockhart*, 877 F.2d 698, 702 (8th Cir. 1989), *aff'd on rehearing* 894 F.2d 1009 (8th Cir. 1990) *cert. denied* 497 U.S. 1011 (1990). Therefore, the first clause of Rule 9(b), which requires a prior determination on the merits, applied in that case. There is no similar requirement in the second clause of Rule 9(b) for a finding of abuse.

Slack then cites *Dellenbach v. Hanks*, 76 F.3d 820 (7th Cir. 1996) *cert. denied* 519 U.S. 894 (1996). However, *Dellenbach* involved an analysis under former 28 U.S.C. §2244(a) & (b), and an instance where the district court had summarily dismissed the habeas petition. The Seventh Circuit's analysis turned on the express language of former 28 U.S.C. §2244(a) and did not even mention Rule 9(b). Not one

of these cases is on point with this case. None involved a first federal petition that was dismissed to allow complete exhaustion and then, a subsequent filing of an amended petition with brand new, unexhausted grounds.

Slack also lists the following cases in support of his argument: *In re Wilson*, 142 F.3d 939 (6th Cir. 1998); *McWilliams v. State of Colorado*, 121 F.3d 573 (10th Cir. 1997); *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997); *Christy v. Horn*, 115 F.3d 201 (3rd Cir. 1997); *Benton v. Washington*, 106 F.3d 162 (7th Cir. 1996); *In re Turner*, 101 F.3d 1323 (9th Cir. 1997); *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996); and *Camarano v. Irvin*, 98 F.3d 44 (2nd Cir. 1996). These cases do not contain an abuse of the writ analysis. In every one of these cases, the courts analyzed 28 U.S.C. §2244 as amended by AEDPA, to determine whether a petitioner must request permission from the circuit court before filing a second petition in federal district court, when the first petition was dismissed without prejudice. In addition, in every one of these cases the petitioner apparently returned with the same claims which had been exhausted following a dismissal without prejudice.

Slack extensively discusses *Camarano v. Irvin*, 98 F.3d 46 (2d Cir. 1996). According to Slack the government in *Camarano* had urged a construction of "second or successive

application" that would have limited the habeas petitioner to those claims contained in the initial habeas corpus petition which had been dismissed without prejudice. (Opening Brief, pg. 33.) This is an inaccurate description of *Camarano*.

In *Camarano*, the petitioner's first federal petition was dismissed without prejudice to exhaust state remedies. Camarano subsequently exhausted his state remedies and moved the Second Circuit for permission to file a second or successive petition under the AEDPA. There is no indication in the *Camarano* decision that the second petition contained new claims or unexhausted claims. *Id.* at 45. The government urged the Second Circuit to interpret the new AEDPA provisions, codified at 28 U.S.C. §2244, to bar a habeas petitioner from repeating *any* claims, even if previously unexhausted. *Id.* at 46. In other words, the government was arguing that a second federal petition should not be allowed even if the second petition contained exactly the same claims as the first, albeit ones which later became fully exhausted. That is not the case with Slack. Respondents never argued below that any of the claims Slack raised in his first federal petition or in his motion to hold his petition in abeyance were abusive and the district court did not hold that they were. The only claims in Slack's petition that were held to be abusive

were the brand new unexhausted claims. *Camarano* does not support Slack's position.

D. The Decision Below and the Ninth Circuit's decision in *Farmer* does not Lead to Absurd and Unconstitutional Results.

Slack also argues that the Ninth Circuit based its decision in *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996) *cert. denied* 520 U.S. 1188 (1997) on a narrow and distorted parsing of Rule 9(b). On the contrary, the Ninth Circuit's analysis of Rule 9(b) was in accord with this Court's decision in *Sanders v. United States*, 373 U.S. 1 (1963) and the Advisory Committee Notes to Rule 9(b). The Ninth Circuit in *Farmer* reached a result well within the formal judicial, statutory, and rules-based doctrines of law governing federal habeas corpus proceedings. *See Lonchar v. Thomas*, 517 U.S. 314, 322 (1996).

As pointed out above, *Sanders* distinguished between successive petition filed after a determination of a prior petition on the merits and a subsequent petition when there had not been a prior determination on the merits. *Sanders* explicitly stated that abuse of the writ defense was available when there was no prior determination on the merits. *Sanders* at 17. Rule 9(b) was based upon this Court's decision in *Sanders* and sets forth no requirement of a prior adjudication

on the merits for a successive petition to constitute abuse of the writ.

In *Farmer*, the Ninth Circuit stated:

> Farmer says that Rule 9(b)'s reference to "second or successive petition" incorporates the concept of a prior merits determination into both clauses. But reading the Rule in this way would render the requirement in the first clause that "the prior determination was on the merits" redundant. We have difficulty reading the second clause as if it, too, includes a requirement that the prior petition (which did not include the grounds alleged in the subsequent petition) be a "prior determination on the merits." Literally, dismissal under this prong may occur if only two things are found: (1) new and different grounds are alleged and (2) the failure to assert those grounds in a prior petition constituted an abuse of the writ. Had Congress intended to limit the bases for dismissal of "new and different" grounds other than by what constitutes an abuse of the writ, it could have done so either by making the entire Rule applicable only if "the prior determination was on the merits" or by adding the phrase "determined on the merits" after the words "prior petition." Given how it is actually written, we cannot say that Rule 9(b) itself requires the prior petition that triggers abuse of the writ analysis to be one that was resolved on the merits. . . .
>
> Although Farmer correctly argues that a habeas petitioner may not be deprived of a hearing on the merits of his first federal habeas case for "equitable" reasons not founded in statute, rule and precedent, *Lonchar v. Thomas*, __ U.S. __, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996), he offers no grammatically sensible way that Rule 9(b) can be read to treat the first prong—providing for dismissal for failing to allege "new and different grounds" when the prior determination was on the merits—the same as the second prong—providing for dismissal for alleging "new and different grounds" when failing to do so in a prior petition was abusive.

Farmer at 1555-1556.

The *Farmer* court correctly determined that Rule 9(b) contains two separate and distinct clauses referring to two separate situations. One requires a prior decision on the merits and the other one does not. The ruling in *Farmer* is consistent with settled rules of statutory construction. Rule 9(b) states in its entirety:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure to assert those grounds in a prior petition constituted an abuse of the writ.

The phrase "and the prior determination was on the merits" clearly modifies the phrase immediately proceeding it: "a second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief."

This reading of Rule 9(b) is also consistent with "the fundamental canon of statutory construction that a qualifying phrase refers solely to its immediate antecedent." *National Coalition for Students with Disabilities Educ. and Legal Defense Fund v. Allen*, 152 F.3d 283, 288, n.6 (4th Cir. 1998); *see also, Anhydrides & Chemicals, Inc. v. The United States*, 130 F.3d 1481, 1483 (Fed. Cir. 1997); 2A Sutherland Statutory Construction §47.33 (5th ed. 1992).

Slack attempts to explain why the phrase "and the prior determination was on the merits" is not included in the second clause of Rule 9(b), by arguing that it was unnecessary. According to Slack, since the second clause refers to new or different claims, obviously they would not have been the subject of a previous adjudication and there would be no reason to refer to a previous adjudication in the rule. In effect, Slack is asking this Court to ignore the basic rules of grammar and statutory construction in order to read something into Rule 9(b) that is simply not there.

Rule 9(b) was based on this Court's decision in *Sanders* and the distinction that *Sanders* made between successive petitions containing the same claims, after an adjudication on the merits, and successive petitions alleging new claims which did not follow an adjudication on the merits. Had Congress intended to require a prior adjudication

on the merits before the abuse of the writ doctrine was applicable it would have said so. Notwithstanding Slack's rather creative reasoning, he has offered no support for his argument that the qualifying phrase "and the prior determination was on the merits" applies to both the phrase immediately antecedent to it and to the phrase following it.

Slack next argues that the decision in *Farmer* ignores the principle that a statute must be interpreted in light of the harm it was meant to address. According to Slack the *Farmer* court's reading of Rule 9(b) would apply in situations in which there is not conduct on the part of the petitioner that could be described as abusive. Slack then lists examples of such behavior like deliberately withholding a claim and forum shopping.

Slack's argument ignores this Court's decision in *McCleskey v. Zant*, 499 U.S. 467 (1991). In *McCleskeyy* this Court stated:

> [A] petitioner may abuse the writ by failing to raise a claim through inexcusable neglect. Our recent decisions confirm that a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice.

Id. at 489.

In this case, the claims the federal district court dismissed as abusive alleged the following:

> 2. Petitioner was denied his right to due process under the Fifth and Fourteenth Amendment because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him.
>
> 4(c) The trial court failed to properly instruct the jury in that the malice aforethought instruction was unconstitutional.
>
> 5. Ineffective assistance of counsel for: a) failing to take any action to prevent the introduction of evidence of sexual contact between Slack and his twelve year old victim; b) failure to object to the jury instruction on reasonable doubt; c) failure to object to the jury instruction on premeditation and deliberation; d) failure to object to the jury instruction on malice aforethought; and e) failure to investigate the facts of the case and develop available defenses.
>
> 6. Ineffective assistance of appellate counsel for: a) failing to challenge the information charging him with open murder and the malice aforethought instruction on appeal; and b) conceding two of the four issues raised in his direct appeal.
>
> 7. The doctrine of cumulative error mandates relief.

JA 71-89, 155-156.

Every one of these claims is apparent from the state court record. There is no reason why Slack could not have raised these claims in his original federal petition. In fact, in his original federal petition Slack challenged his reasonable doubt instruction and the instruction on premeditation. JA 12-13. He could have just as easily challenged the instruction regarding malice aforethought. The same could be said for Slack's ineffective assistance of counsel claims for failing to object to the jury instructions. If Slack could challenge two of the jury instructions in his first federal petition why could he not also challenge his trial counsel's failure to object to the instructions? In addition, Slack challenged the trial court's admission of evidence regarding his sexual relationship with his twelve year old victim yet he did not challenge his trial counsel's failure to prevent the admission of this evidence. All of the claims dismissed as abusive could have been raised in Slack's first federal petition. Slack's failure to do so constitutes an abuse of the writ.

Slack next alleges that applying the abuse of the writ doctrine following a dismissal without prejudice "imposes enormous consequences on the basis of a distinction that simply will not bear the load." (Opening Brief, pg. 40.) According to Slack:

> Before his initial petition was dismissed without prejudice, Mr. Slack informed the

> federal district court that there were additional unexhausted claims outside the petition that he wanted to assert; and solely because those claims were not included in the dismissed and superseded initial petition, those claims were subjected to the Ninth Circuit's preclusion rule. If the unexhausted claims had been pleaded in the dismissed petition rather than drawn to the court's attention by motion, apparently the Ninth Circuit rule would not preclude their consideration; but there is no rational distinction between the two situations in terms of the burden on the federal court or the effect of the dismissal of a petition without prejudice that would justify so drastic a difference in treatment.

Id.

This entire passage is a complete misrepresentation of the record. None of the claims that Slack raised in his motion to hold in abeyance in his first federal proceeding were dismissed as abusive. *See* JA 17-19, 152-156. In fact, not one of the claims Slack raised in his Motion to Stay These Habeas Proceedings was included by his counsel in his amended petition which was the subject of the federal district courts dismissal order. *See* JA 17-19, 66-91. All of the claims that were dismissed as abusive appeared for the very first time in the third amended petition filed by Slack's counsel in his second federal proceeding. Slack is attempting to create a "distinction" that simply does not exist in this record.

Applying the abuse of the writ doctrine to a petition following a dismissal without prejudice will not "irrationally compromise the effectiveness of the state exhaustion proceedings." (Opening Brief, pg. 40). According to Slack, if a petitioner obtains a dismissal without prejudice and returns to state court and discovers additional, previously unknown claims, he would be precluded from raising them in his second federal proceeding. Slack's argument ignores the fact that abuse of the writ may be overcome by a showing of cause and prejudice. If a petitioner can demonstrate cause and prejudice for failing to discover the new claims earlier he may proceed in federal court.

Further, in this case Slack did not return to state court and "discover" his new claims. In fact, these claims were not "discovered" until Slack's counsel filed his amended petition in his second federal proceeding. As noted above, the basis for all of Slack's claims was apparent in the record of his state court proceeding. There is simply no reason why these claims could not have been raised in Slack's first federal habeas proceeding.

Slack next argues that applying the abuse of the writ doctrine to a petition following a prior dismissal without prejudice would result in the suspension of the writ of habeas

corpus in violation of Article I, Section 9 of the Constitution. Slack's argument has no merit.

In *Felker v. Turpin*, 518 U.S. 651 (1996), this Court discussed the suspension of the writ of habeas corpus in the context of the AEDPA, stating:

> The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners. But we have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex Parte Bollman*, 4 Cranch 75, 94, 2 L.Ed. 554 (1807), and we have likewise recognized that judgments about the proper scope of the writ are "normally for Congress to make." *Lonchar v. Thomas*, 517 U.S. 314, ---, 116 S.Ct. 1293, 1298, 134 L.Ed.2d 440 (1996).

Id. at 664.

In enacting Rule 9(b) Congress created legitimate limitations on state prisoners who challenge their convictions in federal court. The application of the abuse of the writ doctrine to successive petitions following a dismissal without prejudice does not create an unconstitutional suspension of the writ of habeas corpus any more than the application of any procedural bars to such a petition.

Slack next lists situations which he argues could occur under the AEDPA if the abuse of the writ bar is applied to

petitions filed after a dismissal without prejudice. Slack's arguments center around 28 U.S.C. §2244 as amended by the AEDPA. This statute does not govern Slack's petition and the issues Slack raises are not before this Court. Slack is attempting to cloud the issue before this Court by creating possible situations under the AEDPA. Regardless of whether any of these situations would occur under the AEDPA, none of them apply to this case and the scenarios Slack raises are not currently before this Court

There is nothing in the statutes, rules or caselaw governing federal habeas corpus review of state court convictions which allows a state prisoner to return to federal court time and again with new unexhausted claims. Slack is not entitled to as many dismissals without prejudice as he wants. Slack's amended petition was abusive within the plain meaning of Rule 9(b). The district court properly dismissed it because of that failing.

E. A Federal District Court's Authority to Fashion Rules Governing the Cases Before Them Does Not Trump Settled Federal Habeas Corpus Law.

Finally, Slack argues that the application the abuse of the writ doctrine to petitions such as his is not necessary because the federal district courts can prevent multiple filings of petitions containing unexhausted claims. According to

Slack, the federal district courts may issue an order dismissing a petition without prejudice and make it a condition that any later petition must not contain unexhausted claims absent extraordinary circumstances, or summarily deny claims that are obviously without merit.

Slack seems to be arguing that the already overburdened federal district courts should accept the burden of policing habeas corpus petitions for any defenses that the respondent would ordinarily be required to raise. What if a petitioner, who has in place an order directing that only exhausted claims may be raised in a subsequent federal proceeding, would be able to demonstrate cause and prejudice to raise new claims and therefore overcome an abuse of the writ bar? Is the cause and prejudice standard a higher or lower standard than Slack's "absent extraordinary circumstances?" What exactly are "extraordinary circumstances?" This Court has specifically set forth the requirements to overcome abuse of the writ. *McCleskey v. Zant*, 499 U.S. 467 (1991). Slack now apparently wishes to create more years of litigation to determine the guidelines for "extraordinary circumstances."

Further, Slack's first federal petition was dismissed expressly in order for him to exhaust his state court remedies. JA 21-22. Rather than doing so, Slack returned to federal court with brand new unexhausted claims. There is no

indication that Slack or his lawyer would have been any more compliant if the federal district court had specifically told Slack that he could not raise any unexhausted claims in his second federal petition.[8] No doubt Slack, and any other petitioner, would attempt to circumvent any order issued by the federal district court under Slack's various scenarios. Contrary to Slack's contention, there would be no reduction in the amount of filings directed at the state respondents and the federal district courts.

Slack is, in effect, arguing that the federal district courts can disregard the law, as set forth by this Court, the Circuit Courts and Congress, because the courts could fashion prophylactic rules that could theoretically achieve the same results. This argument is absurd and should be disregarded by this Court.

---

[8] Respondents would note that the same counsel that represented Farmer in the filing of his third federal petition, consisting of unexhausted claims, now represents Slack and filed his third amended petition containing unexhausted claims. See *Farmer v. McDaniel*, 98 F.3d 1548, 1549 *cert. denied* (9th Cir. 1996). Farmer was specifically told to raise all claims in his second federal proceeding or risk having omitted claims barred under abuse of the writ. *Id.* at 1550. This order did not prevent Slack's current counsel from filing a third federal habeas corpus proceeding on Farmer's behalf raising new, unexhausted claims.

V. CONCLUSION

The federal district court properly dismissed grounds two, four(c), five, six and seven of Slack's habeas corpus petition as an abuse of the writ. The federal district court's decision should be affirmed by this Court.

Respectfully submitted

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Dated: June 21, 1999

Supreme Court, U.S.
FILED
AUG 2 1999
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(10)

No. 98-6322

In The

Supreme Court of the United States

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I.

INTRODUCTION

This Court prescribed the question presented for review, which asks whether claims filed in a habeas corpus petition after exhaustion proceedings, when those claims were not included in the pre-exhaustion federal petition which was dismissed without prejudice, constitute "second or successive" applications. The Court's question assumes that, although Mr. Slack's initial federal habeas corpus filing was dismissed "without prejudice" to allow him to exhaust articulated claims not contained in the initial filing, and although he then did exhaust those claims, the Ninth Circuit treated claims not contained in the initial filing as "second or successive" applications. Despite respondents' arguments to the contrary, Resp. Br. at 13-14 and n.5, 37-38, that is exactly the rule the lower courts applied.

The district court dismissed Mr. Slack's claims of ineffective assistance of trial and appellate counsel, and others, specifically on the ground that they "were not raised in Slack's previous petition." JA 141.[1] In denying reconsideration, the district court ruled that "the instant petition is Slack's second petition and thus successive," and "a second petition is abusive when new grounds are alleged and a petitioner failed to allege them in a previous petition, even if the previous federal petition was dismissed for failure to exhaust state remedies. [Citation]" JA 156. The district court in this case thus dismissed as abusive the same ineffective assistance claims Mr. Slack cited during his 1991 federal proceeding, necessarily finding that those claims, whether or not they were now exhausted,

---

[1] Mr. Slack referred to the claims of ineffective assistance of trial and appellate counsel in his motion to stay proceedings on his 1991 federal petition to allow exhaustion. JA 17-18. These claims were then raised in his state petition, CR 16, ex. 31, and in his renewed federal petition. JA 35, 37-44. The final version of Mr. Slack's federal petition contained these claims, somewhat rearranged, JA 79-89, along with admittedly unexhausted claims, JA 72, 78, 89, which were filed pursuant to the district court's order appointing counsel and directing counsel to explore all available claims with Mr. Slack. JA 64-65.

were "second or successive" because they had not been included in the initial petition.

In the opening brief, petitioner demonstrated that the district court's ruling falls well outside formal judicial, statutory or rules-based doctrines of habeas corpus law, all of which make clear that a "second or successive" habeas application is a petition filed after a federal court has resolved a previous petition. The abuse doctrine under Rule 9(b) of the Rules Governing Section 2254 Cases (and the current rule under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(b)), is a modified res judicata rule. Its application requires adjudication of a previous petition, as this Court clearly indicated in *McCleskey* by emphasizing the "vital relevance" of a "prior adjudication" in applying the abuse doctrine. *McCleskey v. Zant*, 499 U.S. 467, 482 (1991); and this Court's relevant decisions dealing with subsequent petitions – in the context of a "second" petition raising a new claim, as in *McCleskey*, or a "successive" petition raising a claim adjudicated in a previous petition, as in *Kuhlmann v. Wilson*, 477 U.S. 436, 451 (1985) – have focused upon the preclusive effect of a prior final judgment on the merits of the previous petition.

The respondents fail to address the res judicata basis of the abuse doctrine. They thus fail to supply a coherent answer to the question posed by this Court: What is a "second or successive" application? Respondents also do not offer a coherent explanation of how a dismissal without prejudice for exhaustion could be given the same preclusive effect as a "first round" of habeas litigation on the merits, *cf. McCleskey*, 499 U.S. at 492, or how a petitioner (or a district court) can employ the dismissal for exhaustion procedure prescribed by *Rose v. Lundy*, 455 U.S. 509 (1982), without necessarily running afoul of the abuse of the writ doctrine. By contrast, Mr. Slack's resolution of the court's question accommodates the doctrines of *McCleskey* and *Rose*, is consistent with this Court's recent decision in *Stewart v. Martinez-Villareal*, 523 U.S. 677, 118 S.Ct. 1618 (1998), and provides a coherent and rational definition of a "second or successive" petition.

II.

ARGUMENT

A. A "Second Or Successive" Habeas Corpus Application Requires A Prior Adjudication Of The Merits Of A Petition.

As petitioner demonstrated in his opening brief, a habeas application cannot be "second or successive" if there has been no previous merits adjudication by a federal court. Respondents make no attempt to define the term "second or successive", and thus ignore the fact that the Ninth Circuit's rule runs directly counter to the principled evolution of the abuse of the writ doctrine as an aspect of res judicata, *see McCleskey v. Zant*, 499 U.S. 466, 489-90 (1991); *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Lonchar v. Thomas*, 517 U.S. 314, 323-324 (1996); to the lower courts' uniform construction of "second or successive" petition as one filed after a previous merits adjudication by a federal court; and to the exhaustion rule under *Rose v. Lundy*, 455 U.S. 509, 520-22 (1982) and *Ex Parte Hawk*, 321 U.S. 114 (1944). Respondents are similarly silent about the fact that, just last term, in *Stewart v. Martinez-Villareal*, 523 U.S. 677, 118 S.Ct. 1618, 1621 (1998), this Court stressed it would be "seemingly perverse" to apply a construction of "second or successive" application that would attach preclusive effect to a dismissal without prejudice for exhaustion.

Instead of attempting to reconcile the Ninth Circuit's construction of "second or successive" petition with "formal judicial, statutory, or rules-based doctrines of law," *Lonchar*, 517 U.S. at 317, respondents invite this Court to fashion a new, undefined species of writ "abuse," ostensibly designed to prevent the situation where "a habeas petitioner . . . ping-pong[s] back and forth between state and federal court by simply obtaining serial dismissals without prejudice to exhaust state remedies." Resp. Br. at 19.[2] Respondents' invitation entails exactly the type of *ad hoc* rule

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[2] *Amicus* Rutherford Institute describes Mr. Slack as "a hapless pro se defendant" who was unfairly forced to "navigate the treacherous waters of habeas corpus procedure without benefit of legal education or representation." Rutherford *Amicus* brief at 2, 9. Respondents implicitly

making this Court condemned in *Lonchar*. Moreover, adopting a "seemingly perverse" res judicata rule is unnecessary because currently-existing rules and statutes provide a regular and predictable structure for conducting and controlling exhaustion procedures. Thus, to the extent that respondents seek to solve the supposed problem of repeated exhaustion dismissals by adopting an idiosyncratic and incoherent definition of "second or successive" petition – and it is not clear from respondents' brief what their proposed definition is – their proposal is unnecessary in practice as well as impermissible under *Lonchar*.

1) This Court's Abuse Of The Writ Precedents Describe That Doctrine As A "Modified Res Judicata Rule," And Make Clear That No Petition Can Be "Second Or Successive" In The Absence Of A Prior Merits Adjudication.

Under this Court's abuse of the writ precedents, no habeas application can be "second or successive" in the absence of a prior merits adjudication. This Court's ruling in *McCleskey v. Zant*, 499 U.S. 467, 489 (1991), brought the abuse of the writ doctrine under Rule 9(b) substantially into line with traditional res judicata principles by holding that a "second or successive" habeas corpus application could not be entertained unless the federal court had grounds to excuse the failure to raise the claims in the "first round" of habeas litigation. The *McCleskey* Court reached this result by examining the history of the doctrine, noting that the Court's cases had given "controlling weight" to the existence of "a prior refusal to discharge on a like application," and then concluding:

> So while we rejected res judicata in a strict sense as a basis for dismissing a later habeas action, we made clear that **the prior adjudication bore vital relevance** to the exercise of the Court's discretion in determining whether to consider the petition.

---

concede that Mr. Slack, as a non-capital petitioner, had no incentive to file the serial mixed petitions that form the basis for virtually every argument in their brief. Resp. Br. at 19 n.7.

McCleskey, 499 U.S. at 482 (emphasis supplied). In sum, *McCleskey* adopted a straightforward, bright-line rule which gives preclusive effect only to a prior federal adjudication.

The cases following *McCleskey* have all reaffirmed the presumptive res judicata effect of the initial adjudication, and have carefully distinguished between applications filed before and after an initial federal adjudication. *See, e.g., Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 1622 (1998); *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 1502 (1998); *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Schlup v. Delo*, 513 U.S. 298, 319 (1995). In sharp contrast, the Court has disapproved restrictions on first habeas corpus petitions, even in the face of assertedly inequitable conduct, where no previous federal adjudication has occurred. *Lonchar v. Thomas*, 517 U.S. 314, 321 (1996).

Respondents do not address Mr. Slack's res judicata arguments and it is noteworthy that respondents do not discuss the actual rule of *McCleskey*.[3] Instead, respondents seize on the

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[3] Respondents cite a pre-*McCleskey* lower court decision for the proposition that "res judicata as such does not apply in habeas proceedings." Resp. Br. at 20, citing *Hill v. Lockhart*, 877 F.2d 698 (8th Cir. 1989), *aff'd on rehearing*, 894 F.2d 1009 (8th Cir. 1990), *cert. denied*, 497 U.S. 1011 (1990). Ironically, *Hill*'s ultimate holding rests on a res judicata theory: "the district court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition." *Hill*, 894 F.2d at 1010.

Respondents briefly mention one res judicata case, *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 320 (1927), arguing that it condemns the "piecemeal" fashion in which Mr. Slack supposedly seeks to litigate his case. Resp. Br. at 24-25. *Baltimore Steamship*, and every other res judicata case, criticize "piecemeal" litigation where a claimant obtains a judgment on the merits arising out of a single set of operative facts, and then seeks later to bring a second lawsuit pertaining to those same facts. Mr. Slack sought a single federal adjudication, which he has not received, and has continued to pursue all adequate and available state court remedies so that he can present all of his claims for a single federal adjudication. This does not constitute "piecemeal" litigation at all. *See Camarano v. Irvin*, 98 F.3d 44, 46 (2d Cir. 1996). Respondents, by contrast, seem to be advocating the very sort of "piecemeal" litigation condemned by *Baltimore*

McCleskey decision's reference to a "qualified" form of res judicata as though it supports the Ninth Circuit's ruling here, Resp. Br. at 20, but they fail to acknowledge this Court's express recognition that this "qualified" form of res judicata represents "a middle position between the extremes of res judicata and endless successive applications." *McCleskey*, 499 U.S. at 480. The reason why respondents ignore the actual rule of *McCleskey* is plain: The "middle position" adopted in *McCleskey* cannot be stretched to support the Ninth Circuit's preclusion rule here, which applies res judicata in a more "extreme" fashion than in any other area of the law by attaching preclusive effect to a "without prejudice" dismissal.

Respondents' reliance on dictum from *Sanders v. United States*, 373 U.S. 1 (1963) is also misplaced. There, the Court discussed the standards for dismissing "second or successive" petitions in the pre-*McCleskey* era in the context of a 28 U.S.C. § 2255 case. The *Sanders* analysis began from the premise that res judicata does not apply in habeas proceedings. *Sanders*, 373 U.S. at 8. The Court thus refused to take literally language in § 2255 that "seem[ed] to empower the sentencing court to apply res judicata virtually at will" on the ground that to do so would constitute a suspension of the writ under the United States Constitution. *Id.* at 13-15. The Court set out a series of "basic rules to guide the lower courts" as to when "controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief," *Id.* at 15, and directed the lower courts to allow merits litigation on "second or successive" petitions in the absence of a subjective intent by the petitioner "to vex, harass or delay" the proceedings. *Id.* at 18. The Court finally held that, in the § 2255 context, the principles regarding abuse of the writ developed in *Fay v. Noia*, 372 U.S. 391 (1963) and *Townsend v. Sain*, 372 U.S. 293 (1963), "govern equally here." *Sanders*, 373 U.S. at 18.

The *Sanders* decision assumed that a "second or successive" petition was one filed after "denial of a prior application for federal habeas corpus or § 2255 relief," *Sanders*, 373 U.S. at 15, and thus,

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Steamship, by having the federal court preclude (i.e., adjudicate) some of Mr. Slack's claims while he continues to pursue litigation of other claims.

to the extent that *Sanders* retains any vitality, it supports Mr. Slack's position. More important, subsequent authorities have repudiated the *Sanders* Court's rejection of res judicata principles. Soon after *Sanders*, Congress amended 28 U.S.C. § 2244(b) to provide for a qualified form of res judicata in habeas corpus proceedings. In *Kuhlmann v. Wilson*, 477 U.S. 436, 450-51 (1986), this Court explained, "it is clear that Congress intended, as the general rule, to give preclusive effect to a judgment denying on the merits a habeas petition alleging grounds identical in substance to those raised in the subsequent provision." *McCleskey* later honored this intent by holding that general res judicata principles are in fact applicable in the habeas corpus context through the abuse of the writ doctrine of Rule 9(b), *McCleskey*, 499 U.S. at 480; and this Court's decision in *Felker* completed the repudiation of *Sanders* by holding that application of res judicata principles under the standards of AEDPA in the habeas corpus context does not constitute a suspension of the writ. *Felker*, 518 U.S. at 664. In light of these subsequent cases overruling *Sanders*, respondents' reliance on that case is a virtual concession that existing law does not support their position.

Respondents also attempt to distinguish this Court's recent decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998). *Martinez-Villareal* held that a habeas petition filed after a previous merits adjudication, and after three previous "without prejudice" exhaustion dismissals, was not "second or successive" as to a *Ford* claim which could not have been raised at the time of the initial filing, because "it is certain that respondent's *Ford* claim would not be barred under principles of res judicata." *Id.* at 1622; *see* Pet. Br. at 27-31. In other words, the Court in *Martinez-Villareal* applied straightforward principles of res judicata in allowing a post-adjudication proceeding to go forward because the petitioner could not have litigated the claim at the time of the original federal adjudication. If res judicata principles did not bar Mr. Martinez-Villareal's post-adjudication (and post-exhaustion-dismissal) *Ford* claim, they similarly do not bar consideration of Mr. Slack's pre-adjudication claims.[4] Under *Martinez-Villareal*,

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[4] Respondents describe the Court's decision in *Martinez-Villareal* as having been "based on the temporal relationship of petitioner's capacity to

any time a litigant has had no prior opportunity for a federal adjudication, it would be "seemingly perverse" to invoke rules of preclusion to prevent one. *Id.* at 1621. As noted in the opening brief and below, such an opportunity does not exist when a petitioner has not exhausted all of his state remedies.

In sum, respondents fail to address the analytical framework established by this Court's caselaw for defining a "second or successive" application. That framework requires this Court to adopt a definition consistent with the established principles of res judicata cited by petitioner.

2) The Lower Courts' Consistent Construction Of The Term "Second Or Successive" Supports The Conclusion That A "Second Or Successive" Application Is One Filed After A Previous Merits Adjudication.

Mr. Slack's opening brief also demonstrated that, under the exhaustion and abuse of the writ jurisprudence of this Court, the courts of appeals outside the Ninth Circuit (and the Ninth Circuit itself in a post-AEDPA case, *In re Turner*, 101 F.3d 1323 (9th Cir. 1997)) have uniformly held that no application filed after an earlier dismissal without prejudice for lack of complete exhaustion can be "second or successive." Pet. Br. at 31-36. The uniform recognition that a petition filed after a previous dismissal without prejudice for exhaustion is not a "second or successive" application further demonstrates that the Ninth Circuit rule is outside the "evolutionary" development of habeas doctrine referred to in *Lonchar* and *McCleskey*. *See generally*, 2 James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 28.3(b) at 1167-1170 (3d ed. 1998). Respondents do not contest the uniformity of the lower court interpretations of "second or successive"

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be executed vis-a-vis the time he filed his successive petition." Resp. Br. at 26-27. While it is true that the timing of the *Ford* claim was important in *Martinez-Villareal*, it was important there only because established principles of res judicata, as incorporated through the term "second or successive" petition, could not bar a claim that the petitioner could not have litigated at the time of the first federal adjudication. *Martinez-Villareal*, 118 S.Ct. at 1622.

application, nor do they dispute that the lower courts (and this Court in *Martinez-Villareal)* have rejected a mechanical interpretation of "second or successive" application, and have instead examined the question in terms of the principles that underlie the exhaustion and abuse of the writ doctrines.[5]

Respondents thus fail to confront Mr. Slack's arguments regarding the lower courts' consistent interpretation of "second or successive" application. Instead, respondents assert that the uniform lower court construction of "second or successive," which excludes petitions filed after an exhaustion dismissal, supposedly involved cases where only one prior dismissal had occurred. Resp. Br. at 28-29. No authority exists to support such a rule, and not a shred of language from any of the cited cases supports respondents' reading of them.[6] By contrast, every one of the lower court decisions cited in the opening brief refutes respondents' position because they all recognize that the absence of a prior adjudication does not allow a court to give preclusive effect to a dismissal

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[5] When there has been no prior adjudication, a subsequent petition may be numerically a "second" one, but as this Court recognized in *Martinez-Villareal*, 118 S.Ct. at 1621, 1618, the application of the "second or successive" petition bar is not a matter of mechanical counting, but is governed by res judicata principles.

[6] Respondents' position cannot be reconciled with at least four cases, including this Court's cases, cited in Mr. Slack's opening brief: *Martinez-Villareal*, 118 S.Ct. at 1622 (holding that petition filed after three previous exhaustion dismissals and an adjudication of the merits was not "second or successive"); *Ex Parte Hawk*, 321 U.S. 114 (1944) (dismissing habeas petition "without prejudice" for continued exhaustion, despite the existence of at least one previous exhaustion dismissal); *McWilliams v. Colorado*, 121 F.3d 573, 575 (10th Cir. 1997) (holding that petition filed after previous exhaustion dismissal was not "second or successive" even though it appeared that the renewed petitions contained unexhausted claims, and leaving for the district court "the determination of whether Mr. McWilliams had in fact exhausted state remedies"); and *Dellenbach v. Hanks*, 76 F.3d 820, 822 (7th Cir. 1996) (holding that a petition filed after **two** previous "without prejudice" dismissals was not "second or successive," reasoning that "it is not an abuse to file a successive petition if the previous petition **or petitions** were not denied on the merits.") (Emphasis added), *cert. denied*, 519 U.S. 894 (1996).

without prejudice. Like the Ninth Circuit's decision in *Farmer*, discussed below, the respondents offer no coherent analytical basis for a "one exhaustion dismissal" rule; and such a rule, detached from any basis in the res judicata principles of the abuse doctrine, would be exactly the kind of ad hoc rule this court condemned in *Lonchar*. *See* Pet. Br. at 10-12.

3) The *Farmer* Decision And The Consequent Ruling Below Ignore This Court's Exhaustion And Abuse Of The Writ Teachings, And The Eccentric Definition Of "Second Or Successive" Applications They Apply Leads To Absurd And Unconstitutional Results.

Petitioner's brief discussed the analytical flaws in the Ninth Circuit's decision in *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 520 U.S. 1188 (1997), on which the district court based its ruling in this case. Pet. Br. at 37-46. In particular, the Ninth Circuit's rule gives radically different treatment to petitions raising previously adjudicated claims and petitions raising new claims, although both situations arise under the same "second or successive" application provisions of rule 9(b) that this Court interpreted in *Kuhlmann* and *McCleskey*. Respondents nonetheless argue that the *Farmer* court's textual analysis of Rule 9(b) and of *Sanders* correctly concluded that a petition can be found abusive even if there was no adjudication of any claim in a previous petition dismissed for exhaustion. Respondents' argument, and the *Farmer* analysis, disregard the basic premise of *McCleskey* and *Kuhlmann*: Abuse of the writ is a modified res judicata rule, and such a rule simply does not apply (to "same" or "new" claims) when there has been no prior adjudication. *McCleskey* clearly departed from, and in fact overruled, *Sanders*; and *Farmer* demonstrates the confusion which arises from trying to apply both pre-*McCleskey* and post-*McCleskey* doctrine simultaneously.

Under the pre-*McCleskey* regime of *Sanders*, before res judicata principles were applied, it made some sense to examine the petitioner's subjective intent in determining whether the writ was being abused. After the *McCleskey* decision imposed clear res judicata principles on the abuse doctrine, however, analysis of the petitioner's intent was eliminated; but at the same time, the res

judicata rule recognized the "vital relevance" to the proceedings of the "prior adjudication." The *Farmer* decision simply confused the supposedly "abusive" conduct when a petitioner suffered dismissals for exhaustion with the fundamental requirement of a prior adjudication which, under the res judicata rule of *McCleskey*, is a necessary predicate for finding that a "second or successive" application is an abuse of the writ.

The *Farmer* decision itself also contains no rational limiting principle on its idiosyncratic theory of abuse of the writ. The *Farmer* court held that the petitioner could obtain review of all the exhausted claims in his third amended petition (whether or not they had appeared in his previous dismissed federal petitions) since a petition filed after exhaustion "cannot be an abuse of the writ, as it is the very reason for dismissing the petition for failure to exhaust in the first place." 98 F.3d at 1560. But if a petition filed after a previous petition is dismissed for exhaustion can ever be subject to Rule 9(b) as a "second or successive" one, as respondents claim, then the *Farmer* decision is wrong on this point, and any post-exhaustion petition should have been subject to the abuse doctrine. The *Farmer* decision offers no principled rationale for treating the petitioner's third amended petition as subject to the abuse of the writ doctrine, but not the second amended petition, and thus it does not provide this Court with any rational alternative to applying res judicata principles to determine what a "second or successive" application is.[7]

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[7] Mr. Slack's opening brief also catalogued the absurd and unconstitutional results that application of the *Farmer* rule would create. Pet. Br. at 42-46. Respondents do not dispute Mr. Slack's analysis, but assert that this Court should ignore the ramifications of adopting the *Farmer* rule. Resp. Br. at 40-41. Petitioner submits that this Court not only can but must consider the consequences of adopting the Ninth Circuit's *Farmer* rule on the definition of "second or successive" application, since that term is used in both pre-AEDPA law applicable here and in AEDPA itself. 28 U.S.C. § 2244(b).

4) This Court's Exhaustion Precedents Make Clear That A Habeas Application Filed After An Unconditional Federal Court Order Dismissing An Earlier Petition "Without Prejudice" For Lack Of Complete Exhaustion Cannot Be "Second or Successive."

The Ninth Circuit's ruling in this case also cannot be reconciled with this Court's exhaustion jurisprudence. Pet. Br. at 12-22. Despite respondents' insistence that "nothing in *Rose* [*v. Lundy*, 455 U.S. 509 (1982)]" undermines the ruling below, Justice O'Connor's plurality opinion addressed this very situation:

> Those prisoners who misunderstand this [exhaustion] requirement and submit mixed petitions nevertheless **are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims**.

Id. at 520 (emphasis added). The *Rose* opinion warned only of the potential preclusive consequences if a petitioner obtained an adjudication by a federal court on the merits: "a prisoner who decides to *proceed only with his exhausted claims* and deliberately sets aside his unexhausted claims risks dismissal of subsequent petitions." *Id.* at 521 (emphasis added). *Rose* thus clearly contemplates that habeas litigants like Mr. Slack could return to federal court to secure a merits adjudication of their federal claims once all available state proceedings have run their course, as long as they have not already proceeded to a merits adjudication of some of their claims in federal court.

In the opening brief, petitioner also discussed *Ex Parte Hawk*, 321 U.S. 114 (1944), which was central to this Court's analysis in *Rose*. *See* Pet. Br. at 15-19.[8] Although this case falls squarely within the factual and legal terms of *Hawk*, respondents' brief does not refer to that case, which is especially revealing in light of the importance of *Hawk* to exhaustion doctrine. Like Mr. Slack, Mr. Hawk filed a mixed petition after a previous dismissal for lack of complete exhaustion. Despite this previous exhaustion dismissal, this Court recognized that "petitioner has not yet shown that he has

[8] *Hawk* was the case on which the current statutory exhaustion provision was based. *See Darr v. Burford*, 339 U.S. 200, 214 (1950); *Irvin v. Dowd*, 359 U.S. 394, 405 (1959).

exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief," *id.* at 116, and concluded that "as petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice. . . . " *Id.* at 118. This Court should simply follow *Hawk* in this case.

As was the case in *Martinez-Villareal*, the district court told Mr. Slack that the dismissal of his petition in 1991 was "without prejudice" to his right to litigate a new petition after exhaustion proceedings. JA 22. This representation was consistent with the general law, which denies any preclusive effect to a dismissal without prejudice. See Pet. Br. at 19-20. Respondents in fact concede that the "exhaustion requirement is not a rule of preclusion." Resp. Br. at 19. This concession essentially ends the analysis: If a dismissal without prejudice for exhaustion does not have preclusive effect, there is no basis for the district court's ruling here, or the *Farmer* rule on which it is based, that such a dismissal can have preclusive effect.[9]

[9] Respondents assert that one of the authorities cited by Mr. Slack for the general lack of preclusive effect given to "without prejudice" dismissals, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990), supports the "district court's application of Rule 9(b) to Slack's new claims," because Fed. R. Civ. P. 41(a)(1) was "designed to curb abuses of procedural rules which allowed dismissals or nonsuits right up to the entry of the verdict." Resp. Br. at 17. But Rule 41(a)(1) does not apply in the exhaustion context, because that part of the rule deals only with unilateral dismissals by the plaintiff without a court order. In the exhaustion context, the habeas petitioner generally does not desire dismissal at all and in any event does not unilaterally control dismissal. The state respondents, and the court, have primary control over dismissal by court order under Rule 41(a)(2), because the state decides whether to assert the exhaustion defense or to waive that defense and proceed with adjudication, and the court can decide, under some circumstances, to proceed with adjudication of a mixed petition even though the state has raised exhaustion. *See Granberry v. Greer*, 481 U.S. 129, 134-35 (1987); 28 U.S.C. § 2254(b)(2).

5) Current Rules, Statutes, And Judicial Doctrines Provide The District Courts With Ample Authority To Tailor The Proceedings To Prevent Misuse Of The Exhaustion Process.

As petitioner discussed in the opening brief, there are already rules in place, none of which respondents address, to deal with a petitioner who repeatedly seeks dismissal of his petition solely for the purpose of delay, without deforming or overruling this Court's jurisprudence on exhaustion and abuse of the writ. The federal courts can use a conditional dismissal order under Fed. R. Civ. P. 41(a)(2), or the stay and abeyance procedure authorized by the Ninth Circuit Court of Appeals, or the laches provision of Rule 9(a), to prevent what the respondents refer to as the "ping pong" effect of dismissals for exhaustion. Pet. Br. at 46-49.[10] These measures present a rational solution to perceived problems which may arise from dismissals without prejudice under the exhaustion doctrine of *Rose v. Lundy*. Respondents argue merely that these tools do not "trump" the principles applicable to excusing abuse of the writ. Resp. Br. at 41-43. Respondents' argument assumes the answer to the question presented here – that the abuse doctrine does apply to a petition filed after a previous dismissal for exhaustion – and that using these mechanisms would evade the abuse doctrine. Resp. Br. at 43. To the contrary, the measures petitioner cites are reasonable means of dealing with any claimed exhaustion

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[10] When a district court dismisses without prejudice for exhaustion, Fed. R. Civ. P. 41(a)(2) would permit the court to condition the dismissal on the petitioner filing only exhausted claims in a renewed petition, and that order would be enforceable under Rule 41(b). Similarly, if the court allows the petitioner to amend his petition to remove unexhausted claims, and stays the federal proceedings on the remainder of the petition to allow exhaustion, *see Calderon v. United States District Court* (*Thomas*) 144 F.3d 618 (9th Cir. 1998), when the petitioner moves to amend after exhaustion the court could exercise its discretion to allow an amendment to add only claims that are exhausted. To the extent that the state may be able to demonstrate that it suffered actual prejudice from delay occasioned by dismissals for exhaustion, Rule 9(a) of the Rules Governing Section 2254 Cases provides the district court with a basis for dismissal of a petition with prejudice. *Cf. Lonchar v. Thomas*, 517 U.S. 314, 315 (1996).

problems, without abandoning the principled application of the res judicata doctrine of abuse of the writ.

Fundamentally, respondents' complaints about the burdens of repeated dismissals for exhaustion are more properly addressed to the state system. The State of Nevada has not adopted inflexible prohibitions on filing successor habeas petitions.[11] When the state has left its courts open to exhaustion proceedings, as Nevada has done, the federal courts cannot properly be faulted for following the dictates of *Rose v. Lundy* and dismissing mixed petitions to allow for the exhaustion of remedies that the state itself has made available.

B. AEDPA's Technical Amendment To 28 U.S.C. § 2253(c) Did Not Create The Radical, Unconstitutional Shift In Habeas Practice Envisioned By Amici Curiae, And Even If It Did, The Amendment Could Not Be Retroactively Applied In The Absence Of Clear Congressional Intent To Do So And In The Absence Of A Clear Invocation Of The Provision By The Parties.

The amicus curiae brief filed by the attorneys general of several states raises for the first time a number of issues which the respondents in this matter have not asserted, and which are well beyond the certiorari question posed by this Court. This Court has frequently expressed its reluctance to base its ruling in a case upon issues raised only by an amicus, *e.g.*, *Davis v. United States*, 512 U.S. 452, 457 n.* (1994); but since the Court has the power to do so, petitioner must address these issues.[12]

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[11] *See* Nev. Rev. Stat. §§ 34.726, 34.800, 34.810; *Glauner v. State*, 107 Nev. 482, 485 n. 3, 813 P.2d 1001 (1991); *cf. O'Sullivan v. Boerckel*, 119 S.Ct. 1728, 1734 (1999) (rejecting unexhausted claims because they would necessarily be defaulted under state law).

[12] Because of the severe limitation on the length of a reply brief, petitioner can address these issues only in a very summary fashion. To the extent that this Court views any of the assertions made by the attorney general amici as potentially dispositive of this matter, petitioner requests that he be allowed to submit full supplemental briefing on those issues.

Amici primarily assert that federal appellate courts have no jurisdiction under AEDPA to review any procedural or statutory errors at the request of a habeas corpus petitioner. Substantively, amici's position makes no sense and procedurally, it is not properly before this Court.

1. The certificate of appealability provisions of AEDPA do not apply to petitioner's case because respondents have failed to invoke AEDPA; the provisions of AEDPA are not applicable to this case; and the provisions on which amici rely are not jurisdictional.

a) Reliance on the provisions of AEDPA can, in general, be waived by a party's failure to invoke the statute.[13] The respondents have never argued that the certificate of appealability standards of AEDPA applied in this case, *see* JA 185-195, and they do not make that argument here. Petitioner Slack was denied a certificate of probable cause to appeal, under pre-AEDPA law, in the district court; and the court of appeals sua sponte treated the notice of appeal as a request for a certificate of probable cause and denied it. JA 163, 197. Accordingly, any contention that the post-AEDPA standards apply to this case has been waived and is not properly before this Court.[14]

b) The certificate of appealability provisions of AEDPA do not apply to a case in which the petition for writ of habeas corpus was filed pre-AEDPA, even though the notice of appeal was filed post-AEDPA.[15] Petitioner Slack's petition for writ of habeas

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[13] *E.g.*, *Emerson v. Gramley*, 91 F.3d 898, 900 (7th Cir. 1996), *cert. denied*, 520 U.S. 1122, 1139 (1997); *Arnold v. Evatt*, 113 F.3d 1352, 1362 n. 57 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 715 (1998).

[14] The attorney general amici also argue that if a federal habeas petition was filed before the adoption of AEDPA, any claims added after the enactment of AEDPA should be subject to its provisions. Amici offer no authority contradicting the holding of *Lindh v. Murphy*, 521 U.S. 320, 326 (1997), that cases filed prior to the enactment of AEDPA are not subject to the Chapter 153 provisions of AEDPA. Respondents have never asserted that any portion of this proceeding should be subject to AEDPA, and this argument is not properly before this Court.

[15] *Fuller v. Roe*, ___ F.3d ___, 1999 WL 462632, at *2 (9th Cir. July 9, 1999) (per curiam) (citing cases); *United States v. Kunzman*, 125 F.3d

corpus was filed in the district court before AEDPA was enacted, JA 35, and thus the AEDPA provisions amici rely on do not apply here.

c) Amici argue that the requirement of a certificate of appealability is jurisdictional and thus can be reviewed at any time. The requirement of a certificate of probable cause or appealability is jurisdictional; but in a case upon which the amici heavily rely, *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 2324 (1998), Judge Easterbrook's opinion held that a defect in a certificate of appealability does not implicate subject matter jurisdiction and thus was waived by the government's failure to raise the issue.[16] Thus this Court's decision in *Hohn* is controlling: This Court has jurisdiction to review the denial of a certificate of probable cause to appeal, and any issue as to the proper scope of the requested certificate has been waived by the respondents.

2. On the merits, the attorney general amici argue that AEDPA's adoption of 28 U.S.C. § 2253 removed any jurisdiction in the federal appellate courts to correct procedural errors favoring the state in habeas corpus cases. According to amici, Congress accomplished this end by codifying the standard for issuing a certificate of appealability as requiring "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), rather

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1363, 1364 n. 2 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 1375 (1998); *United States v. Skandier*, 125 F.3d 178, 180 (3d Cir. 1997); *Nelson v. Walker*, 121 F.3d 828, 831-832 (2d Cir. 1997); *contra*, *Tiedeman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997).

In *Hohn v. United States*, 524 U.S. 236 (1998), this Court assumed that AEDPA applied in that situation, but it was not presented with any dispute on that issue and therefore did not actually decide it. The court of appeals decision in *Hohn* was filed before this Court decided, in *Lindh v. Murphy*, 521 U.S. at 336, that "the new provisions of Chapter 153 generally apply only to cases filed after the Act being effective." The certificate of appealability provision of 28 U.S.C. § 2253(c)(2), upon which amici relies, is part of the Chapter 153 amendments.

[16] *Accord*, *United States v. Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998) (failure to object to erroneously issued certificate of appealability waives issue), *cert. denied*, 119 S.Ct 1079 (1999).

than "a substantial showing of the denial of a federal right" which was the standard prescribed for a certificate of probable cause by *Barefoot v. Estelle*, 463 U.S. 880 (1983). Amici's argument suffers from insurmountable problems.

a) The amici's position would work a radical change in the availability of appellate review of procedural issues in habeas corpus practice without any indication that Congress intended that result. No court, including this Court, has ever suggested that the "substantial showing of the denial of a federal right" prescribed by *Barefoot*, or the standard now codified in § 2253, refers to anything but the underlying substantive claims of a petition.[17] The only case in which this issue has been addressed, which is not discussed by amici on this point, is *Trevino v. Johnson*, 168 F.3d 173, 176-177 (5th Cir. 1999), pet. for cert. filed, no. 98-9936 (June 17, 1999). There, the court of appeals considered whether the district judge abused his discretion in declining to recuse himself. The court held that a certificate of appealability was required to review the merits of the substantive claims, but not this procedural issue which arose in the district court proceedings. Amici cite no case, and nothing in the legislative history, remotely suggesting that AEDPA was intended to abolish appellate review of errors relating to exhaustion, procedural default, discovery, or any of the procedural issues which may arise in the course of resolving the underlying substantive claims.[18] It is a "fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 119 S.Ct. 1215, 1220

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[17] Respondents do not assert that petitioner's underlying substantive claims are not constitutional ones, and this court need not consider whether AEDPA made any change in the showing required to issue a certificate of appealability as to the substantive claims.

[18] The authority cited by amici in support of their argument in fact relates to whether the underlying substantive claims must be of constitutional stature, not whether AEDPA eliminated all review of procedural rulings which disfavor the petitioner. *Young v. United States*, 124 F.3d at 799.

(1999).[19] When Congress wanted to eliminate review of procedural issues in AEDPA, it did so explicitly, and it did so in a way that precluded review by either party. 28 U.S.C. § 2244(b)(3)(E) (prohibiting review on rehearing or on certiorari of court of appeals' screening decision to allow a second habeas petition to be filed); *see Hohn v. United States*, 118 S.Ct. at 1976.[20]

b) Most important, however, this Court must reject the interpretation of AEDPA proposed by amici because it would render the statute unconstitutional. Under AEDPA, the state respondents in a habeas case do not have to obtain a certificate in order to appeal, but the petitioner must obtain one. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). If, as amici argue, a certificate cannot be issued to review procedural errors committed by a district court, then only one party, the state, can obtain review of all procedural errors which disfavor it, and the petitioner can never obtain such review. Such a scheme of entirely one-sided review would clearly violate the equal protection and due process clauses of the Fifth

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[19] Adoption of the position proposed by amici would also call into question the validity of some of this Court's recent decisions. In *Calderon v. Ashmus*, 523 U.S. 740, 118 S.Ct. 1694 (1998), this Court concluded that a declaratory judgment action to determine whether a state satisfied the "opt-in" standards of AEDPA was premature, in part on the theory that the question of compliance with the "opt-in" standards could be litigated in the habeas proceeding. 118 S.Ct. at 1699. If amici's view is adopted, the decision in *Ashmus* would have to be reconsidered, since that procedural issue could not be reviewed on appeal in federal court at the instance of a petitioner. In *Breard v. Greene*, 523 U.S. 371, 118 S.Ct. 1194, 1699 (1998), this court addressed procedural default issues which, under amici's theory, it could not have jurisdiction to review since the petitioner could never obtain a certificate of appealability to vest jurisdiction in the court of appeals.

[20] If amici's position were adopted, the elimination of any review of procedural and statutory issues on a petitioner's behalf is so radical that it could not be deemed merely procedural and thus applicable retroactively. *See Lindh*, 521 U.S. at 328 and n.4.

and Fourteenth Amendments.[21] Since the interpretation of AEDPA proposed by amici would call into question the constitutionality of AEDPA, and a reasonable alternative construction of § 2253 is available – that the "denial of a constitutional right" refers to the merits of the underlying substantive claims – this Court must reject amici's position.

CONCLUSION

For the reasons stated above and in petitioner's opening brief, this Court should hold that a habeas corpus petition filed after a previous petition has been dismissed without prejudice for exhaustion is not a "second or successive" one for purposes of the abuse of the writ procedure, vacate the order of the court of appeals denying the certificate of probable cause, and remand the cause for further proceedings.

DATED this 2nd day of August, 1999.

Respectfully submitted,

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Federal Public Defender

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[21] *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *see M.L.B. v. S.L.J.*, 519 U.S. 102, 126-127, (1996); *Douglas v. California*, 372 U.S. 353 (1963).

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No. 98-6322

In The
Supreme Court Of The United States
October Term, 1998

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, AND FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE,* IN SUPPORT OF PETITIONER

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April 22, 1999

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QUESTION PRESENTED FOR REVIEW

In light of this Court's recent holding in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), does a federal habeas corpus petition, filed following a previous dismissal without prejudice for lack of exhaustion, constitute a "second or successive petition" under Rule 9(b), when such petition has never had any federal habeas corpus review on the merits?

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No. 98-6322

In The

Supreme Court Of The United States

October Term, 1998

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, AND FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute (TRI) is a non-profit legal and educational organization established in 1982 and based in Charlottesville, Virginia, providing legal services nationwide in defense of civil liberties and human rights. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed numerous *amicus curiae* briefs in the United States Supreme Court, including most recently *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), *Davis v. Monroe County*, Sup.Ct. No. 97-843 (October Term 1998), *State of Wyoming v. Sandra Houghton*, Sup.Ct. No. 99-184 (October Term 1998) and *Kolstad v. American Dental Ass'n*, Sup. Ct. No. 98-208 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of 200 civil rights cases nationally.

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[1] The parties have consented to the filing of this brief. Counsel for The Rutherford Institute authored this brief in its entirety, with able research assistance from Jason C. Wiley, Southern Methodist University School of Law, J.D. 1999. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

This Court's opinion in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) clearly establishes that a federal habeas corpus petition, filed following a previous dismissal without prejudice for lack of state exhaustion, does not constitute a "second or successive petition" under Rule 9(b) of the Rules Governing Section 2254 Cases (herein "Rule 9(b)"). Although *Stewart* was decided under the new rule on "second or successive petitions," its reasoning and conclusion apply equally to the previous rule which governs Mr. Slack's case.

The Ninth Circuit's interpretation of Rule 9(b) is not only contrary to this Court's holding in *Stewart*, but it also constitutes an unjust restriction of the writ of habeas corpus. With an eye toward limiting habeas corpus abuse in capital cases, the Ninth Circuit has fashioned an interpretation of Rule 9(b) which gravely handicaps non-capital defendants such as Petitioner who are not represented by counsel in their habeas corpus actions. For one minor procedural misstep under the Ninth Circuit rule, a hapless *pro se* defendant like Mr. Slack would lose all rights to have his imprisonment reviewed by a federal court.

III. ARGUMENT

A. A federal habeas corpus petition, filed following a previous dismissal without prejudice for lack of state exhaustion, does not constitute a "second or successive petition" within the meaning of Rule 9(b).

In *Stewart v. Ramon Martinez-Villareal*, 523 U.S. 637

(1998), this Court unequivocally announced that "none of our cases . . . have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition." 523 U.S. at ___, 118 S.Ct. at 1622. Over a strong "plain language" objection of two of the Justices, this Court ruled that such a holding was necessary, because "to hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Id.*

Mr. Slack's situation precisely fits this Court's description in *Stewart* of a petition not to be considered "second or successive." His initial petition in this case was dismissed without prejudice to allow Mr. Slack to pursue unexhausted state remedies. He returned after exhausting state remedies, seeking a hearing on the merits of his federal habeas corpus petition. With the benefit of this Court's decision in *Stewart*, it is now clear that the district court and the Ninth Circuit should not have dismissed Mr. Slack's current petition as "second or successive."

Respondents argue that *Stewart* is inapplicable to Mr. Slack's case because *Stewart* was decided under a more recent amended law, and because the respondent in *Stewart* was raising a claim that had been dismissed for lack of ripeness rather than for lack of exhaustion. Both of Respondents' arguments lack merit.

It is, of course, true that *Stewart* was decided under the

newer habeas standards of review of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), codified as 28 U.S.C. § 2244(b). It is also undisputed that the AEDPA does not apply to habeas petitions which were pending in federal court prior to its enactment. *Lindh v. Murphy*, 521 U.S. 320 (1997). Mr. Slack's current federal habeas petition was filed prior to 1996, and is governed by the older Rule 9(b) of the Rules Governing Section 2254 Cases. Rule 9(b) provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

However, the fact that *Stewart* was decided under the updated and amended version of this rule, codified as 28 U.S.C. § 2244(b), does not affect the reasoning of this Court with regards to what constitutes "second or successive." The language and meaning of "second or successive" was not changed by the AEDPA. As the Fifth Circuit has recognized, "Section 2244(b) does not define 'second or successive' petition. The specific language in the Act is derived from Rule 9(b), Rules Governing Section 2254 Cases, 28 U.S.C. foll. 2254." *In re Gasery*, 116 F.2d 1051, 1052 (5th Cir. 1997). The Fifth Circuit pointed out that while the AEDPA imposed stricter rules than Rule 9(b) for how the courts treat "second or successive"petitions, "nothing in the AEDPA affects the determination of what constitutes a 'second or successive' petition." *Id.* Furthermore, by its own declaration, this Court was referring to and relying on **pre**-AEDPA caselaw when it proclaimed that "none of our cases

. . . have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition." *Stewart*, 523 U.S. at ___, 118 S.Ct. at 1622. Thus this Court's analysis of what constitutes a 'second or successive' petition under the AEDPA in *Stewart* is directly applicable to the same determination under Rule 9(b).

The Ninth Circuit fails to acknowledge the consistency of the meaning of "second or successive" in 9(b) and 28 U.S.C. § 2244, recognized by this Court and other federal circuits. In a pre-AEDPA case governed by Rule 9(b), *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), the Ninth Circuit held that "abuse of the writ analysis is not foreclosed as matter of law solely because prior petitions have not been reviewed on the merits." *Id.* at 1549. This interpretation, consistent with the Ninth Circuit's ruling in Mr. Slack's case, is in tension with the Ninth Circuit's holding in a post-AEDPA case, *In re Turner*, 101 F.3d 1323 (9th Cir. 1997). The court in *Turner* held that the provisions of the AEDPA that pertain to requirements for filing second or successive habeas petitions "[do] not apply to second or subsequent petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies." The Ninth Circuit has no valid justification for imposing the harsher rule in pre-AEDPA Rule 9(b) cases than this rule it announced in *Turner*.

Respondents' second argument against applying *Stewart* to the instant case fails just as readily. Respondents attempt to distinguish *Stewart* on the grounds that Stewart's previous petition was dismissed for lack of ripeness rather than for lack of state exhaustion. However, this Court has already taken

note of and specifically rejected this argument:

> True the cases are not identical; respondent's *Ford* claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time. But in both situations, the habeas petitioner does not receive an adjudication of his claim.

Stewart, 523 U.S. at ___, 118 S.Ct. at 1622.

In fact, in analyzing Stewart's ripeness claim, this Court looked to long-settled state exhaustion doctrine regarding "second or successive petitions" to make its determination. "We believe respondent's *Ford* claim here -- previously dismissed as premature -- should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies," this Court reasoned. *Id.* A contrary holding, the *Stewart* majority opined, would have "far-reaching and seemingly perverse" implications for habeas practice. *Id.* If the rights of a petitioner returning to federal court after exhausting state remedies were so clear and settled as to have formed the basis for this Court's analysis in *Stewart*, it is disingenuous for Respondent to argue that *Stewart* is inapplicable to the case at bar and that its interpretation of "second or successive" is tenable.

Mr. Slack's petition is therefore governed by this Court's holding in *Stewart* and is not a "second or successive" petition.

B. The Ninth Circuit's interpretation of Rule 9(b), made with an eye toward limiting habeas corpus abuse in capital cases, results in manifest injustice when applied to non-capital defendants such as Petitioner, who are unrepresented by counsel in their habeas corpus actions.

As this Court has recognized, "habeas corpus has traditionally been regarded as governed by equitable principles." *Sanders v. United States*, 373 U.S. 1, 17 (1963). In fact, a procedural default in a habeas corpus petition can be disregarded and a hearing on the merits appropriately held where the prisoner can show that he has suffered a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. 478 (1986). In the charge of Congress to reduce capital habeas corpus petitions from clogging federal courts, and in the effort of courts to heed Congress' instructions, fundamental justice must not be compromised.

Just as the drafters of the AEDPA were intent upon limiting the abuse of the federal habeas corpus system by capital defendants,[2] so the Ninth Circuit undoubtedly had the

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[2]Although the habeas corpus reforms contained in the AEDPA affect many non-capital defendants, abundant evidence demonstrates that Congress was focused on capital cases when it enacted the revisions. The statute's title, Anti-terrorism and Effective Death Penalty Act, describes its purpose. The legislative history and statements made after the Act's passage confirm this intent. Senator Orrin Hatch, for example, declared that "In April 1996 Congress passed the Antiterrorism and Effective Death Penalty Act . . . which accomplished a decade-long effort to ensure that a . . . capital sentence imposed by a state court could be carried out without awaiting the disruptive, dilatory tactics of counsel for condemned prisoners." *Hearings on S.J. Res. 6 Before the Senate Judiciary Committee*, 105th Cong. (Apr. 16, 1997)(statement of Senator Orrin

(continued...)

pressing load of death penalty cases in mind when it interpreted Rule 9(b) so harshly in Mr. Slack's case. However, unlike Mr. Slack, every capital defendant is entitled to qualified legal representation in any post-conviction federal habeas corpus proceeding. 21 U.S.C. § 848(q)(4)(B). In fact, this right to counsel attaches even in the preparation stage, before the federal habeas petition has been filed. *McFarland v. Scott*, 512 U.S. 849 (1994). One may well argue that a capital defendant represented by qualified legal counsel could be expected to comply with the exacting technical standards imposed by the Ninth Circuit's interpretation of Rule 9(b).[3]

Indigent non-capital defendants like Mr. Slack have no such representation. Mr. Slack was required to navigate the treacherous waters of habeas corpus procedure without the benefit of legal education or representation.[4] As the Ninth Circuit itself has acknowledged, habeas corpus is fraught with "barriers of form and procedural mazes" which the writ must overcome. *Brown v. Vasquez*, 952 F.2d 1164, 1166 (1992) (quoting *Harris v. Nelson*, 394 U.S. 286, 291 (1969)).

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[2](...continued)
Hatch), 1997 WL 241160.

[3]Even this argument rings hollow however, when one considers the inexperience of many attorneys who are assigned to capital habeas appeals, and the gravity of the prospect of imposing, without review in federal court, a death sentence on a defendant who may have been unfairly convicted or sentenced in state court.

[4]The district court later appointed counsel to assist Mr. Slack, determining that it was in the best interest of justice to do so. Counsel was not appointed, however, until long after Mr. Slack's first federal habeas corpus petition had been filed and dismissed.

Under these circumstances, the unrelenting interpretation of Rule 9(b) adopted by the Ninth Circuit proves punitive and fundamentally unfair.

Not only does the Ninth Circuit rule violate equity and fundamental principles of justice, but it fails to advance the purposes for which Rule 9(b) was written. The Advisory Committee to the Rules notes that Rule 9(b) incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders*, 373 U.S. 1. In *Sanders*, this Court explained:

> [I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if ... the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18. The evidence in this case demonstrates that Mr. Slack's motives were not to vex, harass, or delay. Nor could his actions be viewed as causing needless piecemeal litigation. Mr. Slack, an unrepresented, non-capital defendant, was in federal court pursuing a habeas corpus petition for less than three months before his petition was dismissed. Recognizing that Mr. Slack's failure to comply with exhaustion requirements was due to ignorance rather than an intent to abuse the system, the district court dismissed Mr. Slack's initial petition without prejudice, granted him

leave to file a later habeas corpus application upon exhaustion of state remedies, and later appointed him counsel in the interests of justice.

Principles of equity and fairness dictate that Mr. Slack and those like him not be barred from ever having their habeas corpus petitions heard on the merits. Mr. Slack should not be permanently deprived of his right to have his case reviewed in federal court as punishment for his failure to master the complexities of federal habeas corpus procedure. If the Ninth Circuit's interpretation of Rule 9(b) is to stand, that court will enjoy a reduction in the number of habeas corpus petitions it must consider. However, the unconscionable cost will be borne by Mr. Slack and other non-capital unrepresented defendants, as well as those capital defendants with incompetent lawyers. These ill-fated prisoners will forever lose their opportunity, guaranteed by the United States Constitution, to have a federal court determine whether they are being unjustly imprisoned by the states.

IV. CONCLUSION

The Rutherford Institute, as *amicus curiae*, urges this court to reverse the ruling of the Ninth Circuit in this case and remand to the Ninth Circuit with directions to remand to the District Court for further proceedings consistent with this Court's decision.

Respectfully submitted,

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April 22, 1999

(12)

No. 98-6322

In The

Supreme Court of the United States

October Term, 1998

ANTONIO T. SLACK,

Petitioner,

v.

E.K. McDANIEL, Warden, Ely (Nevada) State Prison, and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FEDERAL DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court granted certiorari limited to the following question:

Where a state prisoner's initial federal habeas corpus petition (28 U.S.C. §2254) is dismissed for failure to exhaust state remedies and where he subsequently exhausts state remedies and refiles a federal petition, whether claims included within the second petition that were not included within the initial §2254 filing constitute "second or successive" habeas applications.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FEDERAL DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide — along with 78 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal defense law, to disseminate and advance knowlege of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on many occasions. *See, e.g., Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998); *Hohn v. United States*, 118 S.Ct. 1969 (1998).

The Federal Defenders Association was formed in 1995 to enhance the representation provided under the Criminal Justice Act (18 U.S.C. §3006A) and the Sixth Amendment to the Constitution of the United States. The Association is a non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defenders offices nationwide. One of FDA's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is properly represented.[1]

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1 Both parties have consented to the appearance of NACDL and FDA as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

SUMMARY OF ARGUMENT

A renewed federal habeas corpus petition may not be classified as "second or successive" or dismissed as an abuse of the writ where the earlier federal petition was dismissed without prejudice on procedural grounds (e.g., lack of total exhaustion) and received no merits adjudication. This Court's earlier decision in *Rose v. Lundy*, 455 U.S. 509 (1982), which directs the federal courts to dismiss habeas petitions containing exhausted and unexhausted claims, clearly contemplated that habeas litigants would be free to return to the federal courts to secure merits adjudication of their federal claims once they had first presented all of their claims to the state courts.

This Court's recent decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998), handed down subsequent to a contrary Ninth Circuit decision on which the lower courts relied in this case, holds squarely that dismissal of a prior federal habeas petition for nonexhaustion was without prejudice to filing a new federal petition once exhaustion is complete. Moreover, dismissal without prejudice for nonexhaustion does not render a subsequent habeas petition "second or successive" as that term is defined in Habeas Rule 9(b) or newly-amended §2244(b), as modified by AEDPA. The definition of "second or successive" retains its prior meaning under the new habeas provisions. Under either statutory regime, the renewed habeas application filed here does not qualify as "second or successive" or constitute an abuse of the writ.

ARGUMENT

A RENEWED FEDERAL HABEAS CORPUS PETITION MAY NOT BE CLASSIFIED AS "SECOND OR SUCCESSIVE" OR DISMISSED AS AN ABUSE OF THE WRIT WHERE THE EARLIER FEDERAL PETITION WAS DISMISSED WITHOUT PREJUDICE ON PROCEDURAL GROUNDS (E.G., LACK OF TOTAL EXHAUSTION) AND RECEIVED NO MERITS ADJUDICATION

In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court ruled that a federal habeas corpus petition that contained both exhausted and unexhausted claims — what it denominated a "mixed petition" — should be subject to a rule of "total exhaustion"; *viz.* the federal petition should be dismissed in its entirety to allow the habeas litigant an opportunity to return to the state courts to present these new claims in the first instance. *Id.* at 520-22. *Lundy* nonetheless contemplated that the habeas petitioner ultimately would return to the federal courts for merits adjudication of his now-exhausted federal claims.

Antonio Slack's initial federal habeas petition was dismissed in 1992 "without prejudice" for nonexhaustion, with the district court granting him leave "to file an application to renew upon exhaustion of all state remedies." After pursuing post-conviction relief in the Nevada state courts, he returned to the federal district court in 1995, filing an amended habeas corpus petition containing the claims he had recently presented to the state post-conviction courts along with the claims

previously raised in his original 1991 federal filing.[2]

The district court, however, dismissed four of his claims with prejudice because they had not been previously raised in his original (and unadjudicated) federal petition. Finding these newly-asserted claims to be an "abuse of the writ" under Rule 9(b) of the Rules Governing Section 2254 Proceedings in the United States District Courts and *McCleskey v. Zant*, 499 U.S. 467 (1991), the district court placed principal reliance on the Ninth Circuit's decision in *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), which held, for the first time among the courts of appeals nationwide, that a renewed federal habeas petition could be rejected as an abuse of the writ even though the earlier petition had been dismissed without prejudice for failure to exhaust state remedies and had not received merits review in any respect. *See id.* at 1561-63 (Schroeder, J., concurring in part and dissenting in part).

Notwithstanding *Farmer* or AEDPA's recent amendment of 28 U.S.C. §2244(b), relating to "second or successive" habeas corpus applications, this Court's subsequent decision in *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998) has effectively rendered *Farmer* dead letter. *Martinez-Villareal* held specifically that dismissal of prior federal habeas petitions for lack of exhaustion did not make any renewed post-exhaustion federal petition "second or successive", as defined by Rule 9(b) of the §2254 Habeas Rules

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2 It should be noted that the amended federal petition was filed in 1995, prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, which made significant changes in various provisions of the federal habeas corpus statutes. Accordingly, this case must be considered under the pre-AEDPA standards. *See Lindh v. Murphy*, 521 U.S. 320, 322-23 (1997). Nonetheless, the changes AEDPA made, in particular to 28 U.S.C. §2244(b), do not affect the disposition or outcome of this case.

or newly-amended §2244(b). Moreover, the *Farmer* court's idiosyncratic definition of "second or successive" cannnot stand because the amended version of §2244(b), enacted by AEDPA, retains the same definition of "second or successive" as that contained in unamended Habeas Rule 9(b), which was unchanged by AEDPA.

Prior to the enactment of AEDPA, the caselaw construing former §2244(b) recognized several situations in which a habeas petition that was numerically "second or successive" could not be subjected to the restrictive rules governing successive petitions. In particular, where the earlier petition did not, or could not, produce a judgment on the merits, any second petition subsequently filed was not properly classified as a second or succesive petition. *See* 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* §28.3b at 1163 & nn.16-17 (3d ed. 1998).

Indeed, this Court noted that AEDPA preserved the pre-existing law's recognition that an earlier federal petition not resolved on the merits is not ordinarily subject to statutory or common law restrictions upon successive petitions. *Martinez-Villareal*, 118 S.Ct. at 1621-22 (treating pre-AEDPA law as applicable and dispositive of issue whether refiling of claims previously dismissed for nonexhaustion is "successive" under AEDPA). The Court explained (*id.* at 1622):

> [N]one of our cases ... ha[s] ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.

The Court in *Martinez-Villareal* was considering a refiled execution-competence claim after a previous filing had been dismissed for prematurity rather than nonexhaustion. Nonetheless, the Court explained that the same rationale for permitting unrestricted refiling after dismissal for nonexhaustion applied as well to other "dismissal[s] of a first petition for technical procedural reasons" (*id.* at 1622):

> [I]n both situations [dismissals for nonexhaustion or prematurity], the habeas petitioner does not receive an adjudication of his claim. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.

This Court's ruling in *Martinez-Villareal* thus effectively ratified the decisions of the lower courts, which, with virtual unanimity, have come to the same conclusion, with respect to both pre- and post-AEDPA §2244(b). *See* Liebman & Hertz §28.3b and text accompanying nn.28-37 (collecting cases). *See also In re Wilson*, 142 F.3d 939, 940 (6th Cir. 1998)("Recently, this court joined every other court to consider the question and held that a habeas petition filed after a previous petition was dismissed without prejudice for failure to exhaust state remedies is not a 'second or successive' petition ..." (collecting cases)); *Carlson v. Pitcher* 137 F.3d 416, 419 (6th Cir. 1998)("every court addressing the issue since AEDPA took effect has held that a habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of §2244(b)(1)" (citing cases)); *McWilliams v. Colorado*, 121 F.3d 573, 575 (10th Cir. 1997)(court "accept[s] the view espoused by every circuit that has considered this issue since enactment of the [AEDPA]: a

habeas petition filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies does not qualify as a 'second or successive' application within the meaning of 2244(b)(1)"); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997)("[a]lthoughthe AEDPA's amendment to §2244 imposes stricter requirements for 'second or successive' petitions than the pre-AEDPA 'abuse of the writ" standard in [Habeas] Rule 9(b), nothing in the AEDPA affects the determination of what constitutes a 'second or successive' petition' as that phrase is used in amended section 2244; court accordingly relies on pre-AEDPA caselaw decided under Habeas Rule 9(b) to conclude that new petition filed after previous petition had been dismissed for lack of exhaustion did not constitute 'second or successive' petition"); *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997)(accord); *Benton v. Washington*, 106 F.3d 162, 164-65 (7th Cir., 1996)("1996 legislation ... preserves the concept of the 'second or successive petition' ... [and] [t]hose words retain the meaning they had under Rule 9(b)"); *In re Turner*, 101 F.3d 1323, 1323 (9th Cir. 1996)("We hold that section 2244 does not apply to second or subsequent habeas petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies ..."); *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996)(accord); *see especially Camarano v. Irvin*, 98 F.3d 44, 46-47 (2d Cir. 1996)(earlier habeas petition dismissed for nonexhaustion: " because application of [section 2244(b)'s] gatekeeping provisions to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review ... a dismissal without prejudice can have no preclusive effect on subsequent petitions").

This Court long ago recognized that it should avoid reading statutes in a manner that produces absurd results. *Rowland v. California Men's Colony*, 506 U.S. 194, 200 n.3 (1993). Here, the Court does not have to engage in reading language in a manner that "does least violence to the text"

because there is a reasonable interpretation of §2244(b) that avoids any absurdity and does no violence to the text — that is, the section must be read to bar only those claims raised and determined on the merits in a prior federal habeas application.

A contrary reading would mean that, whenever a federal court dismissed a habeas application raising unexhausted claims, those claims would be barred forever. *See Rose v. Lundy*, 455 U.S. at 522 ("[A] district court must dismiss habeas petitions containing both exhausted and unexhausted claims"). Yet Congress implicitly has directed the contrary result in newly-enacted §2254(b)(2). After codifying the exhaustion rule in §2254(b)(1), Congress stated that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State". 28 U.S.C. §2254(b)(2). By using the word "may", Congress authorized dismissal for failure to exhaust — as opposed to "denial on the merits" — with a clear expectation that the dismissed applicant late would file a subsequent federal application containing newly-exhausted claims that did not warrant "denial on the merits" in their unexhausted state. This subsequent application, though numerically second, could not be a "second or successive" application barred by §2244(b). *See Martinez-Villareal*, 118 S.Ct. at 1625 (Thomas, J., dissenting)("Claims presented in a petition dismissed for failure to exhaust are neither 'determined' nor 'adjudicated.' * * * In [that] situation, the federal court dismisses the unexhausted petition without prejudice, *see Rose v. Lundy*, 455 U.S. 509, 520-22 (1982), so it could be argued that the petition should be treated as if it had never been filed").

The term 'second or successive" did not come to the AEDPA devoid of history or prior meaning in the habeas context. Both Habeas Rule 9(b) and pre-AEDPA case law

defined "second or successive". *See Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986)(plurality opinion); *McCleskey v. Zant*, 499 U.S. at 487 (quoting Habeas Rule 9(b)). In passing AEDPA, Congress presumably was aware of the meaning of "successive" in the context of habeas proceedings. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)(relying on prior judicial interpretation of statutory language in Title VI to inform interpretation of Title IX).

When Congress enacted AEDPA, it took into account possible conflicts with codified rules, and it amended Habeas Rules inconsistent with the new law to make them consistent with AEDPA. *See, e.g.*, FRAP Rule 22, amended to conform to the new appellate-certification requirements of newly-amended 28 U.S.C. §2253. Congress did not, however, amend Habeas Rule 9(b), finding it otherwise consistent with AEDPA. The only reasonable conclusion is that Congress intended the courts to continue treating certain subsequent petitions as if, legally, they were first petitions because their claims, exhausted or unexhausted, had not been "determin[ed] ... on the merits ..." Habeas Rule 9(b).

In the absence of a specific definition in §2244, this Court should look to the fact that Congress left intact the Rule 9(b) language defining a successive petition as one that was previously determined on the merits. Nothing in the text or legislative history of AEDPA suggests that Congress intended to alter this distinct meaning of the term. This Court has said that "[w]here Congress has not expressly declared a word to have a particular meaning, it will be presumed to have used the word in its well-understood public and judicial meaning." *Toxaway Hotel Co. v. Smathers & Co.*, 216 U.S. 439 (1910); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 700-01

(1992)(applying same rule where Congress re-enacts a statute after this Court has interpreted the language of the former provision).

Based upon this well-established meaning of "second or successive", the courts of appeals uniformly have held that §2244(b) does not apply to now properly-exhausted subsequent habeas applications where a prior federal petition had been dismissed without prejudice — or merits consideration — for failure to exhaust state remedies. That was precisely the holding of the Ninth Circuit which this Court affirmed in *Martinez-Villareal* (118 F.3d 628, 632-33 (9th Cir. 1997)):

> In *In re Turner*, we concluded that "section 2244 does not apply to second or subsequent habeas petitions where the first was dismissed without prejudice for failure to exhaust state remedies". 101 F.3d 1323, 1323 (9th Cir. 1996). The Second Circuit arrived at the same conclusion in *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996). The *Camarano* court confronted the question of "whether a habeas petition qualifies as a 'second or successive' application within the meaning of §2244, where it is filed after a prior petition is dismissed without prejudice for failure to exhaust state remedies". *Camarano*, 98 F.3d at 46. The court concluded that "because application of the gatekeeping provisions [of §2244] to deny a resubmitted petition in cases such as this would effectively preclude any federal habeas review ... a dismissal without prejudice can have no preclusive effect on subsequent petitions." *Id.* at 46-47; *see also Christy v. Horn*, 115 F.3d 201 (3d Cir. 1997).

Under the circumstances, then, it is manifest that the courts below, in reliance upon the Ninth Circuit's misinterpretation of §2244 in *Farmer*, have mistakenly conflated failure to exhaust with procedural default in assessing the consequences of asserting newly-exhausted claims in a subsequent habeas application where the earlier petition had not received merits consideration. The doctrine of exhaustion and that of the independent and adequate state procedural ground are distinct and have differing repercussions. Both doctrines involve situations in which a failure to present a claim in the state courts bars granting relief in federal courts. The procedural default doctrine ultimately bars habeas relief on the merits. *Coleman v. Thompson*, 501 U.S. 722 (1991). The exhaustion doctrine, on the other hand, is merely an ordering device. *Granberry v. Greer*, 481 U.S. 129 (1987). Exhaustion never wholly forecloses, but only postpones, federal consideration on the merits. *See* Liebman & Hertz §23.1 and text accompanying nn.21-25. *See also Boerckel v. O'Sullivan*, 134 F.3d 1194, 1196-97 (7th Cir.), *cert. granted on other grounds*, 119 S.Ct. 508 (1998)(exhaustion and procedural default doctrines "are distinct and have different ramifications").

Accordingly, this Court should adhere to its decision in *Martinez-Villareal* and reaffirm that where a prior federal habeas petition has been dismissed for failure of total exhaustion, in conformance with *Rose v. Lundy*, any subsequent federal petition with newly-exhausted claims — whether or not those claims were asserted in the earlier abortive federal petition — should receive merits consideration as a first federal petition, and not be subject to dismissal as a "second or successive" petition. To the extent that *Farmer* is to the contrary, it should be overturned.

CONCLUSION

The order of the court of appeals should be vacated and this case remanded for further proceedings in accordance with a determination that a habeas corpus application cannot be dismissed as "second or successive" where the initial petition was dismissed without prejudice for failure to exhaust state remedies.

Respectfully submitted,

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No. 98-6322

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANTONIO T. SLACK, *Petitioner*,

v.

E. K. MCDANIEL, Warden, Ely Nevada State Prison, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, FLORIDA, IDAHO, KANSAS, MISSISSIPPI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA AND WASHINGTON IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing 'second or successive' habeas applications?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998
No. 98-6322

ANTONIO T. SLACK, *Petitioner*,

v.

E.K. MCDANIEL, Warden, Ely Nevada State of Prison, et al.,
Respondents.

INTEREST OF AMICI CURIAE

All decisions by this Court concerning habeas corpus applications filed pursuant to Section 2254[1] of Title 28 of the United States Code are of interest to amici, as amici are responsible for defending presumptively valid state court judgments against federal habeas corpus challenges. In addition to the specific "second or successive" habeas application issue set forth in the order granting the writ of certiorari, this case presents threshold jurisdictional and previously unaddressed retroactivity-related questions, the resolution of which will have a substantial impact on Section 2254 cases throughout the country. Amici's interests would therefore be served by a resolution of those threshold issues, as well as the substantive question presented.[2]

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1. All further references to "sections" are to sections of Title 28 of the United States Code, unless otherwise specified.

2. This brief is submitted in support of respondents by amici

SUMMARY OF ARGUMENT

Petitioner Slack may not challenge the denial of his habeas corpus petition by invoking the statutory certiorari jurisdiction of this Court. His "case" was never properly "in" the court of appeals. Under the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA or the Act), which applies to Slack's dismissed claims because he first asserted them and sought to appeal their dismissal after the statute's enactment, Slack could bring his case to the court of appeals only if he made a substantial showing of the denial of a constitutional right. But, here, he sought to appeal the non-constitutional ruling that five of his claims were "second or successive" and that he abused the writ.

Section 1254 provides that this Court may exercise certiorari review power only over "cases" that were "in" the court of appeals. In order for Slack's "case" to have been "in" the court of appeals, that lower reviewing court must have had jurisdiction over the case. And this Court must satisfy itself of this point before it may proceed to decide the merits of Slack's claim. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

Here, the United States Court of Appeals for the Ninth Circuit lacked jurisdiction over Slack's intended appeal. Before a petitioner in a Section 2254 case can appeal a district court decision, permission to appeal must

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through their respective Attorneys General in accordance with Rules 37.2 and 37.5 of the Rules of the Supreme Court of the United States. Amici are confident that the "second or successive" petition question will be thoroughly addressed in the brief filed on behalf of Warden McDaniel by the Nevada Attorney General. Therefore, amici's brief is limited to certain threshold jurisdictional and retroactivity-related issues that must be resolved prior to the resolution of the "second or successive" habeas corpus application question. *See* Rule 37.1 of the Rules of the Supreme Court of the United States.

first be obtained. Specifically, the petitioner first must obtain from the district court, the court of appeals, or a circuit justice, a certificate of appealability, as required by Section 2253(c), as amended by the AEDPA. In order to obtain such a certificate, the petitioner must make a "substantial showing of the violation of a *constitutional* right." *Id.* (emphasis added).

The certificate of appealability requirement applies in this case because Slack's intended appeal involved only habeas claims asserted *after* April 24, 1996, the day the AEDPA was enacted, and because his request to appeal was not filed until after that date. These facts take this case outside the confines of this Court's holding in *Lindh v. Murphy*, 521 U.S. 320 (1997), "that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.*, at 336. *Lindh* did not define what constituted a "case filed" for purposes of its decision. Defining such a "case" in terms of when the subject *claims* for relief were actually asserted, rather than in terms of other possible events, better reflects Congress' intent in enacting the AEDPA and avoids pernicious results.

In this case, there is no possible way Slack could meet the certificate of appealability requirement of showing the violation of a constitutional right. Slack sought, and still seeks, review of the district court's denial of five of his claims on second or successive petition / abuse of the writ grounds. Whether a petition, or a claim in a petition, is second or successive is not a constitutional question, let alone a "substantial" one. Instead, those questions involve policy limitations set by statute or rule concerning the availability of habeas corpus relief.

Because Slack could not have properly obtained a certificate of appealability, the Court of Appeals for the Ninth Circuit did not have jurisdiction over the appeal. As a result, the "case" was never "in" the court of appeals within the meaning of Section 1254, and therefore may not be reviewed by this Court now.

ARGUMENT

I.

Because Slack Could Not Meet The AEDPA'S Criteria For A Certificate Of Appealability, This Court Lacks Statutory Certiorari Jurisdiction To Review Slack's Appeal

Introduction

This Court's statutory certiorari review power is limited to "cases" that were "in" the court of appeals. 28 U.S.C. § 1254(1) (West 1999). In order for a case to have been in the court of appeals, the circuit court must have had jurisdiction over the case. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

Before a federal habeas corpus petitioner can pursue an appeal from a district court's denial of relief in a Section 2254 case, the petitioner must first obtain permission. *See* 28 U.S.C. § 2253(c) (West 1999); Fed. R. App. P. 22 (West 1999). Here, the provisions of chapter 153 of the Judicial Code (28 U.S.C. §§ 2241-2255), as amended by the AEDPA, apply to this case, at least with respect to the five claims that were dismissed as abusive, because those claims were first asserted, and permission to appeal first sought, after the AEDPA was signed into law in April 1996. Under the new AEDPA provisions of chapter 153, Slack was required to request, and obtain, a "certificate of appealability." To obtain such a certificate, Slack was obligated to make "a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c)(2) (emphasis added).

The specific issue on which Slack sought review in the Court of Appeals concerns the correctness of the district court's dismissal of five of his claims on second or successive petition / abuse of the writ grounds. Whether a habeas corpus application is second or successive is not a constitutional question. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (application of abuse of the writ doctrine as delineated by case law and later tightened by statute does not infringe on the Constitution); *see also McCleskey v. Zant*, 499 U.S. 467, 479-89 (1991) (demonstrating that the doctrines of second or successive petition and "abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," but not by constitutional mandate). Because Slack's intended appeal did not even involve a constitutional issue, let alone one of a "substantial" nature, the Court of Appeals could not have issued a certificate of appealability, and therefore lacked jurisdiction over any appeal. Since the Court of Appeals lacked jurisdiction over the case, the second or successive application question was never "in" that court, and may therefore not be reviewed by this Court now.

A. Section 2253(c), As Amended By The AEDPA, Governed Slack's Request To Appeal From The District Court's Denial Of Five Claims On Second Or Successive Petition/Abuse Of The Writ Grounds

1. The Post-AEDPA Provisions Of Chapter 153, Which Include Section 2253(c), Apply To Any Claims Asserted After The Enactment Date Of The Act, Whether Those Claims Are Asserted In A New Habeas Corpus Petition Or By The Amendment Of An Already Existing Petition

In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court held "that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.*, at 336. The basis of this holding was the negative implication of Section 107(c) of the AEDPA, which explicitly stated that chapter 154 of the Judicial Code, exclusive to death penalty proceedings, applied to "pending" cases, where no such express congressional intention appeared with respect to chapter 153. Therefore, the *Lindh* majority determined that Congress intended for chapter 153 to apply only to "cases filed" after April 24, 1996, the day the Act became effective. *Id.*

In the instant case, Slack filed a habeas corpus petition prior to April 24, 1996. However, he amended that petition three times after the enactment of the AEDPA.[3] With respect to the amendments after April

3. Slack filed a first amended petition in October 1996, a second amended petition in June 1997, and a third amended petition in December 1997. The second and third amended petitions were filed on Slack's behalf by counsel who was appointed in February 1997.

24, 1996, several new claims were added, including all five of the claims ultimately dismissed as abusive.

Lindh did not have occasion to address the issue of whether the Act should apply to claims added to a petition, via amendment, *after* the enactment date of the AEDPA. Likewise, *Lindh* did not have occasion to determine whether the date a request to appeal, or notice of appeal, is filed, as opposed to the date the petition was filed in the district court, should dictate whether the certificate of appealability or certificate of probable cause standard should govern. In short, *Lindh* did not explicitly define when a "case" is "filed" with respect to post-AEDPA claims and appeals. This Court must resolve these issues before it may exercise jurisdiction over the merits of Slack's appeal.

The absence of a controlling definition has resulted in a split in the circuit courts with respect to when a habeas corpus "case" is "filed" for purposes of applying the provisions of the AEDPA. Some courts have held that a "case" commences upon the filing of a petition. *See Gosier v. Welborn*, ___ F.3d ___, 1999 WL 228890, *1 (7th Cir. 1999); *Williams v. Coyle*, 167 F.3d 1036, 1039-40 (6th Cir. 1999); *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998); *see also Calderon v. United States District Court for the Central District of California (Beeler)*, 128 F.3d 1283, 1287 n.3 (9th Cir. 1997); *see also Tiedman v. Benson*, 122 F.3d 518, 520-21 (8th Cir. 1997) (for purposes of applying appellate provisions of the AEDPA, the "case" is filed when the application for a certificate of appealability, or a notice of appeal, is filed, regardless of when the actual Section 2254 petition was filed). Other courts have held, though, that the mere filing of a request for counsel in a death penalty case initiates a "case" for purposes of determining whether the AEDPA applies. *See Calderon*

All three of these petitions are in the record.

v. United States District Court for the Central District of California (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc) (overruling *Beeler*). Amici submit that the courts fixing the date the petition was filed as the operative date for determining when the "case" commenced are closer to the mark. However, even the "petition filed" standard is not specific enough for purposes of determining whether the AEDPA applies to "claims" filed after April 24, 1996.

The spirit of the *Lindh* holding, prior decisions of this Court, and common sense all demonstrate that a Section 2254 "case" in the district court must be the equivalent of a "habeas corpus petition containing specific claims for relief." Based on this Court's reasoning in *Lindh*, it is a fair conclusion that Congress did not intend the new provisions of chapter 153 to apply to *claims for relief* asserted in habeas petitions which had been filed prior to the enactment of the AEDPA. But there is nothing in *Lindh*, nor anything in the Act itself, that shows a congressional intent to forgo application of the new law to claims asserted after April 24, 1996, whether by filing a new petition or by amending one that was already in existence.

Lindh should not be read to mean that, as long as a "case," given its broadest definition, was pending prior to the enactment of the AEDPA, the case will be governed for all purposes by habeas law as it existed prior to April 24, 1996. To the contrary, for purposes of determining which law to apply to resolve the claims asserted for relief, *Lindh* should be read to construe "case" in a narrower claim-specific fashion. Failure to read *Lindh* in such a manner would lead to results that are both absurd and contrary to congressional intent.

An example illustrates this point: If on April 23, 1996, the day prior to the enactment of the AEDPA, a state inmate filed a Section 2254 petition comprised of a single claim for relief, the "case" would be litigated in accordance with pre-AEDPA habeas law per *Lindh*. If, however, one

month after filing that single-claim petition, the state inmate filed a first amended petition that included five new claims, and then deleted the single claim that was in the initial petition, the "case" would be comprised solely of five claims for relief, all of which were asserted *after* April 24, 1996. There is no logical reason to infer that Congress intended that those five claims would not be subject to the provisions of the AEDPA.

As another example, a habeas petitioner might have filed a petition containing only a single unexhausted claim for relief on the day prior to the AEDPA's enactment. *Rose v. Lundy*, 455 U.S. 509 (1982), mandates that such a petition be dismissed without prejudice. But if, sometime after April 24, 1996, the petitioner amended the petition to purge it of the unexhausted claim, and then added a fully exhausted claim in its place, dismissal could be avoided. *See, e.g., Calderon v. United States District Court (Taylor)*, 134 F.3d 981, 986 (9th Cir. 1998). Under an unduly broad interpretation of "case," pre-AEDPA habeas law would again apply. This fictional habeas petitioner would therefore be in a better position than a petitioner who did not file a petition until April 25, 1996, but did so in a procedurally correct manner by asserting only exhausted claims. In other words, the petitioner in the foregoing hypothetical situation would have evaded the AEDPA by filing a procedurally defective petition subject to dismissal in its entirety. Congress could not possibly have intended such a result.

Amici acknowledge that, in both of the foregoing hypothetical scenarios, the filing of first amended petitions technically did not institute new "cases," at least for some purposes. *See Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U.S. 570, 73-76 (1913) (holding that an amendment to a complaint was not equivalent to the commencement of a new action). In some sense, the "cases" were pending prior to the enactment date of the AEDPA. But it is implausible to conclude that Congress would have

intended or desired to elevate form over substance in this way in prescribing the reach of the AEDPA, especially given its presumed prior knowledge of both this Court's retroactivity jurisprudence and of the federal habeas corpus process.

True retroactivity situations involve the enactment of a new law, and its application to claims for relief that were pending at the time of enactment. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Because of the inherent inequities associated with resolving claims by reference to a law that did not exist at the time the relevant conduct or event occurred, new laws are applied retroactively only under very narrow circumstances. *Id.* But, it is only if the pertinent conduct or event actually occurred prior to the enactment of the new law that a retroactivity question arises.

Justice Scalia explained in his concurring opinion in *Landgraf* that a critical means for ascertaining whether a statute can be deemed even to have some sort of retroactive effect on a case involves looking to the relevant activity regulated by the statutory provision, and then determining if that activity occurred before or after enactment of the statutory provision. *Id.*, at 291 (Scalia, J., concurring). As Justice Scalia observed in a highly pertinent passage:

> Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. ***But other statutes have a different purpose and therefore a different relevant retroactivity event.*** A new rule of evidence governing expert testimony, for example, is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is the introduction of the testimony.

Id., at 291-92 (emphasis added).

The approach taken by the *Landgraf* majority with respect to focusing on the pertinent retroactivity event to determine whether a statute has a retroactive effect parallels in substantial ways the critical inquiry adopted by Justice Scalia's concurring opinion. As the *Landgraf* majority explained,

> [a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, [citation omitted], or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to the *events* completed before its enactment.

Id., at 269-70 (emphasis added).

Thus, to determine when a "case" is "filed" under *Lindh*, the relevant retroactivity "event" must be the presentation of a specific claim or claims for habeas corpus relief, either by filing a petition, or by amending an already existing petition. Realistically, a habeas corpus "petition" is nothing but the vehicle for presenting "claims" for habeas relief. For a pleading to qualify as a Section 2254 habeas corpus petition, it must contain the "claim" or "claims" upon which the petitioner relies in support of his assertion that he is being held in state custody in violation of his constitutional rights. Rules Governing Section 2254 Cases In United States District Courts, Rule 2(c), 28 U.S.C. foll. § 2254 (West 1999) (a habeas corpus petition "shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified therein").

The AEDPA itself contains several provisions that all emphasize the importance and relevance of the habeas corpus claims that comprise the petition, as opposed to the "petition" itself. *See* 28 U.S.C. § 2244(b)(1) (West

1999) ("a *claim* presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed") (emphasis added); § 2254(d) (West 1999) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any *claim* that was adjudicated on the merits in State court proceedings. . . .") (emphasis added); § 2264(a) (West 1999) ("Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a *claim or claims* that have been raised and decided on the merits in the State courts. . . .") (emphasis added). Additionally, the procedural rules governing habeas corpus actions focus on the allegations of error made in a petition, rather than on the petition itself. *See* Rules 2, 5-9, Rules Governing Section 2254 Cases In United States District Courts, 28 foll. U.S.C. § 2254. Hence, the focus for determining how to resolve claims, and what law should be applied in that regard, necessarily requires the actual existence of claims for relief.

The provisions of chapter 153, as amended by the AEDPA, therefore should apply to any claim for relief asserted in a Section 2254 petition after the enactment date of the AEDPA because any such application is inherently prospective in nature. Applying the AEDPA in the manner advocated herein presents no retroactivity concerns, and would in no way be contrary to or inconsistent with this Court's decision in *Lindh*.

Therefore, the provisions of the AEDPA, including the certificate of appealability requirement of Section 2253(c), should apply with respect to every claim Slack asserted after April 24, 1996. Those claims include each and every claim ultimately dismissed by the district court on second or successive petition grounds. Slack's proposed appeal concerned only the correctness of the

district court's dismissal of these five abusive claims. Thus, the AEDPA's certificate of appealability provision governed Slack's intended appeal.[4] As will be argued below, *see* pp. 16-23, *infra*, Slack was unable to qualify for a certificate of appealability, depriving the Court of Appeals and this Court of jurisdiction over his case.

2. Regardless Of When The Claims Were Asserted, The AEDPA's Certificate Of Appealability Requirement In Section 2253(c) Nevertheless Applies Any Time A Certificate Is Requested, Or Notice Of Appeal Is Filed, After The Enactment Date of The AEDPA

Even if this Court rejects amici's argument that the provisions of chapter 153, as amended by the AEDPA, generally apply to any claim asserted after the enactment date of that law, the Act's certificate of appealability requirement nevertheless should apply in any instance, like the case at bar, where an application for a certificate to appeal, or a notice of appeal, was filed after the

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4. Slack might argue that, even if amici's argument is correct, his post-AEDPA claims nevertheless "relate back" to his petition that was on file prior to the AEDPA's enactment, making all of his claims subject to the law that existed prior to April 24, 1996. Such an argument would be specious, as the relation back doctrine of Federal Rule of Civil Procedure 15(c) is completely inapplicable outside the statute of limitations context. That intended application is confirmed by the plain language of the rule, the Advisory Committee Notes to Rule 15(c), and by prior decisions of this Court. *See* Fed. R. Civ. P. Rule 15(c) Advisory Committee Notes ("Relation back is intimately connected with the policy of the statute of limitations"); *Schiavone v. Fortune*, 477 U.S. 21 (1986) (applying relation back doctrine to New Jersey statute of limitations for libel actions). In any event, the "relation back" doctrine does not apply to the Section 2244(d) one-year limitations period at all. But this Court need not address that issue here.

enactment date, regardless of when the actual Section 2254 petition was filed in district court. The United States Court of Appeals for the Eighth Circuit has so held, and this Court strongly implied in *Hohn v. United States*, ___ U.S. ___, 118 S. Ct. 1969 (1998) that the Eighth Circuit's assessment was correct.

In *Tiedman v. Benson*, a case decided subsequent to this Court's decision in *Lindh*, the Court of Appeals for the Eighth Circuit ruled that the *Lindh* holding was not applicable to Section 2253(c), as amended by the AEDPA, for two main reasons. First, both the court and the parties agreed that the certificate of appealability requirement was purely procedural.[5] *Tiedman*, 122 F.3d at 520-21. But more important, the Eighth Circuit observed that there was

> no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of a case in a trial court, instead of on the filing of a notice of appeal or similar document.

Id., at 521.

In other words, unless a request for a certificate of probable cause or notice of appeal had been filed, or there was an actual appeal pending when the AEDPA was enacted, as was the case in *Lindh*, there is no retroactivity concern with respect to the certificate of appealability requirement of Section 2253(c). The long-standing gatekeeping function of requiring habeas corpus petitioners to obtain permission to file an appeal is not implicated until such time as a request for permission is actually made. If that request is not made until some time after the enactment of the AEDPA, applying the

5. "The parties to this case agree that the new provisions with respect to certificates of appealability made no substantive change in the standards by which applications for such certificates are governed." *Tiedman*, 122 F.3d at 521.

certificate of appealability requirement would constitute a prospective application of that law.

Like the Eighth Circuit, this Court in *Hohn v. United States* strongly indicated that if the request to file an appeal, or a notice of appeal, was filed after the enactment date of the AEDPA, the new certificate of appealability requirement applied. In *Hohn*, following convictions in federal court for drug offenses and a related firearm offense, Hohn filed a motion under Section 2255 in the district court in relation to the firearm conviction. While the motion was pending, the AEDPA was enacted. Hohn's motion was denied, and in July 1996, three months after the enactment of the AEDPA, he filed a notice of appeal. The Eighth Circuit treated the notice of appeal as a request for a certificate of appealability, and denied the request based on its belief that the claim Hohn wanted reviewed was not grounded in the Constitution. Hohn petitioned this Court for a writ of certiorari. The writ of certiorari was granted solely on the question of whether this "Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability." *Hohn*, 118 S. Ct. at 1971-72.

The precise holding in *Hohn* was, "We hold this Court has jurisdiction under § 1254(1) to review denials of *applications for certificates of appealability* by a circuit judge or a panel of a court of appeals." *Id.*, at 1978 (emphasis added). The holding necessarily implies that the Eighth Circuit properly required Hohn to request a certificate of appealability.[6] This is significant in light of the fact that Hohn's Section 2255 motion was pending at the time the AEDPA was enacted, and *Lindh* held that chapter 153, which includes Section 2255, does not generally apply to "cases filed" prior to the enactment of

6. If the certificate of appealability requirement was not applicable in Hohn's case, then the issue actually decided by this Court in *Hohn* would not have been ripe for review.

the AEDPA. *Lindh*, 521 U.S. at 336. Under the law applicable prior to the enactment of the AEDPA, an individual seeking relief pursuant to Section 2255, like Hohn, was not required to obtain any type of permission whatsoever prior to appealing a district court's denial of relief. *See* 28 U.S.C. § 2253 (pre-AEDPA version). Hence, this Court's holding in *Hohn* necessarily incorporates the ruling that, so long as the request to appeal, or notice of appeal, was filed after the enactment date of the AEDPA, regardless of when the Section 2255 motion or Section 2254 petition was filed, the AEDPA's certificate of appealability requirement applies.

As additional grounds for the conclusion that the *Hohn* holding supports the application of the certificate of appealability requirement in any case where the request for a certificate, or a notice of appeal, was filed after the enactment date of the AEDPA, amici point to this Court's reliance on post-AEDPA circuit rules in support of the express *Hohn* holding that the filing of a request for a certificate of appealability constitutes a "case" for purposes of review under Section 1254(1). Specifically, this Court "dr[e]w guidance from the fact that every Court of Appeals except the Court of Appeals for the District of Columbia Circuit has adopted Rules to govern the disposition of certificate applications," and then cited to those rules, all of which were enacted in 1998, well after the enactment of the AEDPA. *Hohn*, 118 S. Ct. at 1973.

In other words, this Court relied on the new manner in which the courts of appeals are handling requests for certificates of appealability to support its holding that the application for a certificate was a "case" that was "in" the "court of appeals." The fact that this Court specifically held that certificates of appealability were reviewable under Section 1254, and relied on various rules specifically adopted by the circuits to facilitate decisions with respect to applications for certificates of appealability, certainly implies that this Court believed the AEDPA's certificate

of appealability requirement was applicable under the procedural posture of *Hohn*.

The procedural posture of the instant case is the same as in *Hohn*. Slack requested permission to appeal after the AEDPA was enacted. So, even independent of the fact that his dismissed claims were first asserted after April 24, 1996, the certificate of appealability requirement applies in this case as it did in *Hohn* and *Tiedman*.

As amici will discuss next, Slack could not meet the certificate of appealability requirement. The merits of his "case" were never "in" the court of appeals. As a result, this Court lacks statutory certiorari jurisdiction over the present appeal.

B. A Federal Appellate Court Lacks Jurisdiction Over Any Appeal From The Denial Of Relief In A Section 2254 Or 2255 Case Unless The Petitioner Satisfies The Requirements Of Section 2253(c) And A Certificate Of Appealability Is Issued

The requirement in Section 2253(c) that a certificate of appealability be obtained prior to an appeal taking place in a Section 2254 (or 2255) case is a jurisdictional prerequisite. *See Hohn*, 118 S. Ct. at 1975-76 (treating Section 2253 as jurisdictional in nature and comparable to the jurisdictional prerequisite of filing a proper notice of appeal before the Court of Appeals may review the substance of a case); *id.*, at 1980 (Scalia, J. dissenting, joined by Rehnquist, C.J., O'Connor, J., and Thomas J.) (same); *see also Trevino v. Johnson*, 168 F.3d 173, 1999 WL 79738, *4 (5th Cir. 1999) ("We lack jurisdiction to consider the merits of a district court order denying habeas relief without issuing a COA"); *Gerlaugh v. Stewart*, 167 F.3d 1222, 1223 (9th Cir. 1999) ("An appeal may not be taken unless the applicant has made the substantial

showing of the denial of a constitutional right and a certificate of appealability is granted"). Hence, in order for the Court of Appeals to have had jurisdiction over Slack's intended appeal, Slack was required to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The two-judge Ninth Circuit panel refused Slack's request to pursue an appeal, indicating the Ninth Circuit's belief that it did not have jurisdiction over the intended appeal.[7]

Amici recognize that the Ninth Circuit's belief that it lacked jurisdiction does not mean that such was the case, or that its determination is not reviewable by this Court. This Court always has jurisdiction to determine its own jurisdiction. *See Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970). In the *Hohn* decision, this Court held that it had jurisdiction under Section 1254(1) to review the denial of a request for a certificate of appealability by a circuit judge or court of appeals panel. 118 S. Ct. at 1978. Thus, this Court has statutory certiorari power to review the Ninth Circuit's denial of Slack's application to appeal the

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7. In actuality, Slack requested, and was denied by both the district court and the two-judge Ninth Circuit panel, a certificate of probable cause, which was required prior to the enactment of the AEDPA. However, based on the circumstances of this case, the certificate of appealability requirement should have been applied. Regardless of whether the issue was raised below, there can be no avoiding the jurisdictional question posed by the certificate of appealability requirement. A federal reviewing court cannot obtain jurisdiction over the subject matter of the intended appeal absent the issuance of a certificate of appealability. 28 U.S.C. § 2253(c); *Trevino*, 1999 WL 79738, *4; *Gerlaugh*, 167 F.3d at 1223. An objection to subject matter jurisdiction cannot be waived, and may be raised at any time. *See, e.g., Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *California v. LaRue*, 409 U.S. 109, 112 n.3 (1972); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18, and n.17 (1951).

district court's dismissal of five of his claims on second or successive petition grounds.

However, in performing that review, this Court at first is limited to applying the certificate of appealability standard, and determining whether Slack met that standard. That is, before addressing the substantive second or successive petition issue briefed by the parties to this action, this Court must determine whether Slack has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c).

This Court's decision in *Hohn* does not answer the jurisdictional question presented here. The narrow holding in *Hohn* was only that this Court had statutory certiorari jurisdiction to review a court of appeals' denial of an application for a certificate of appealability. *Hohn*, 118 S. Ct. 1978. By no means did this Court say in *Hohn* that, simply because the certificate of appealability question was reviewable, the merits of the intended appeal, which were never adjudicated in the court of appeals, were also automatically reviewable. To the contrary, this Court has previously made clear in *Nixon v. Fitzgerald*, 457 U.S. at 741-43, that jurisdiction over a substantive question first must have existed in the court of appeals before the question is reviewable by this Court under section 1254.

Nixon involved the issue of Presidential immunity. In the course of a civil lawsuit, the district court ruled that President Nixon was not entitled to complete immunity, and the President pursued a collateral order appeal from that ruling. In order to meet the jurisdictional prerequisite to pursue such an appeal, he had to demonstrate, among other things, that the appeal raised a "serious and unsettled question" of law. *Nixon*, 457 U.S. at 742, quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547 (1949). The United States Court of Appeals for the District of Columbia Circuit had dismissed the appeal for its lack of jurisdiction because the President

could not meet that *Cohen* requirement. *Nixon*, 457 U.S. at 742. Before addressing the merits of the immunity issue, following its granting of a writ of certiorari, this Court explained that it first was required to determine whether the "case" had properly been "in" the lower appellate court to start with, *id.*, at 741-43, even though the court of appeals had dismissed the appeal for lack of jurisdiction and therefore had never even addressed the substantive immunity issue.

Because this Court has the power to review a court of appeals' decision to dismiss for lack of jurisdiction,[8] the jurisdictional issue of whether the President had presented a "serious and unsettled" question was reviewable. The Court determined that the Court of Appeals' dismissal for lack of jurisdiction was erroneous because the Presidential immunity issue was the type of "serious and unsettled" question properly presented in a collateral order appeal. Therefore, President Nixon had presented an appealable question that invested the Court of Appeals with jurisdiction over his case. Because the Court of Appeals had jurisdiction over the substantive issue, it was one that was "in" the court of appeals and subject to Supreme Court review under Section 1254(1). *Nixon*, 457 U.S. at 743.

As *Nixon* makes clear, the determination of whether this Court has statutory certiorari jurisdiction over the merits of a particular issue first involves the examination of whether the lower appellate court had jurisdiction over that issue. In the context of this case, *Nixon* mandates that, prior to reviewing the actual second or successive

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8. As this Court observed in *Nixon*, "There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction -- a power we have exercised routinely. [Citation]. If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated from review by this Court." *Id.*, at 731 n.23.

petition issue, this Court must make sure that Slack met Section 2253(c)'s jurisdictional prerequisite of showing the substantial violation of a constitutional right that would warrant the issuance of a certificate of appealability. Such a ruling would mean the Ninth Circuit did have jurisdiction over Slack's intended appeal, and that the second or successive petition issue was actually "in" the Court of Appeals for purposes of Section 1254.

However, Slack could not, under any circumstances, satisfy the certificate of appealability requirement of showing the violation of a *constitutional* right. 28 U.S.C. § 2253(c)(2). Second or successive petition issues do not arise out of the Constitution. *See Felker*, 518 U.S. at 664 (application of abuse of the writ doctrine as delineated by case law and later tightened by congressional statute does not infringe on the Constitution); *see also McCleskey*, 499 U.S. at 479-89 (doctrines of second or successive petition and "abuse of the writ refer[ ] to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," but not by constitutional mandate). In the absence of an adequate showing of a constitutional violation, the Ninth Circuit lacked jurisdiction over Slack's intended appeal. In turn, this Court lacks jurisdiction over the second or successive petition issue now.

Prior to the enactment of the AEDPA, it was permissible to obtain appellate review of a district court's ruling like that in Slack's case. Under the pre-AEDPA version of Section 2253, a habeas corpus petitioner was still required to obtain permission to file an appeal by obtaining a certificate of probable cause. However, as this Court stated in *Barefoot v. Estelle*, to obtain the certificate of probable cause, a habeas corpus petitioner was required only to "make a 'substantial showing of the denial of [a] *federal* right.'" 463 U.S. 880, 893 (1983). While issues like exhaustion and second or successive petition certainly present federal *statutory* questions, 28 U.S.C. §§

2254(b)(1)(A), 2244(b), they do not present *constitutional* questions. As the United States Court of Appeals for the Seventh Circuit has aptly observed, "there is a gulf between a statutory and a constitutional error." *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997), citing *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993), *Pulley v. Harris*, 465 U.S. 37, 41 (1984), and *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

In ascertaining what Congress meant by substituting the word "constitutional" for the word "federal," this Court may resort to traditional instruments of statutory construction. Initially, a plain-language reading of Section 2253(c) indicates the showing required to obtain a certificate of appealability under the AEDPA is greater than the *Barefoot* "federal right" standard that governed certificates for probable cause. *Hubbard v. United States*, 514 U.S. 695, 708 (1995) (courts should attempt to give effect to the plain language of an Act of Congress when possible). Moreover, even without looking to the legislative history underlying the post-Act version of Section 2253, Congress is presumed to be aware of the contemporaneous law in existence at the time it chooses to enact a new statute. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982); *see also*, *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Based on that presumption, when Congress enacts a new law that incorporates language of a pre-existing law, Congress is presumed to have adopted that interpretation for purposes of the new law. *See Merrill Lynch*, 456 U.S. at 382 n.66; *Lorillard*, 434 U.S. at 580-81. It is also true, though, that when Congress, in enacting a new law, *changes* language of a pre-existing law, it seeks to alter the pre-existing interpretation. *See West Winds, Inc. v. M.V. Resolute*, 720 F.2d 1097, 1100 (9th Cir. 1983) ("All that can be said with certainty about the fact that a statute has been amended is that the amendment presumably changes legal rights under the statute"); *see also* 1A N. Singer,

Sutherland on Statutes and Statutory Construction § 22.30 at 266 (5th ed. 1992) ("any material change in the language of the original act is presumed to indicate a change in legal rights").

If it was simply Congress' intent to codify the "federal right" standard annunciated in *Barefoot v. Estelle*, Congress would have used that specific language in amending Section 2253. Congress instead intended to do more. Given Section 2253's inherent role as a gateway designed to reduce federal appeals from district court denials of habeas corpus relief, *Barefoot*, 463 U.S. at 893, Congress could have meant only to further reduce the class of district court habeas denials cognizable on appeal by eliminating appellate challenges to those denial orders resting entirely on non-constitutional grounds.

This textual interpretation of the post-AEDPA version of Section 2253(c) best fits the express general intent of the legislators in enacting the Act itself, namely to streamline and curtail the federal appellate process in habeas corpus cases. *See, e.g.*, 141 Cong. Rec. S4590-93 (daily ed. March 24, 1995) (statement of Sen. Specter, co-sponsor of the Act) (bill designed to address "one of the most serious aspects of the crime problem: the interminable appeals process that has made the death penalty more a hollow threat than an effective deterrent"); 141 Cong. Rec. H1400 (daily ed. Feb. 8, 1995) (statement of Rep. McCollum) (bill intended to "curtail [] the seemingly endless appeals of death row inmates" while maintaining "full constitutional protections"); *id.*, at H1402 (statement of Rep. Young) (bill intended to "create consistent and fair procedures for [death penalty] application and to streamline the current appeals process").

Moreover, the actual timing of the proposed changes to Section 2253(c) that ultimately were embodied in the Act also lends support to amici's contentions. When the AEDPA was originally submitted as H.R. 729 to the

House of Representatives, it expressly sought to codify *Barefoot* verbatim as to the showing required to obtain a certificate by using the word "federal" rather than "constitutional." *See* 141 Cong. Rec. H1400, H1404 (daily ed. Feb. 8, 1995) [H.R. 729, §§ 102, 103]; *id.*, at H1430-31 (statement of Rep. Smith); *id.*, at H1431-32 (statement of Rep. McCollum). However, when the provisions of what finally became the Act were introduced into the Senate that same year, the word "federal" was replaced with the word "constitutional." *See* 141 Cong. Rec. S4585-93 (daily ed. March 24, 1995) [S. 623, §§ 3, 4]. It was that version that became law. Simply put, Section 2253(c)'s recent amendment demonstrates Congress' intent to require a Section 2254 petitioner to make a higher showing before gaining access to the federal appellate courts.

"If the district court denies a petition based on a statutory issue, § 2253(c)(2) precludes an appeal." *Young*, 124 F.3d at 799. It is beyond dispute in the instant case that the district court's order denying petitioner habeas corpus relief rested on *non-constitutional* grounds -- namely, abuse of the writ. *See Felker*, 518 U.S. at 653-64; *see also McCleskey*, 499 U.S. at 479-89. There is, therefore, no possible way Slack could meet the requirement of Section 2253(c)(2) that he show the substantial violation of a constitutional right with respect to the issue for which he sought, and still seeks, review. The Court of Appeals for the Ninth Circuit could not have had jurisdiction over the non-constitutional issue raised by Slack. Consequently, this Court does not have statutory

certiorari jurisdiction over that issue now. *Nixon*, 457 U.S. at 743.

CONCLUSION

Accordingly, amici respectfully request that the writ of certiorari be dismissed for want of jurisdiction. *See, e.g., Jefferson v. City of Tarrant, Alabama*, __ U.S. __, __, 118 S.Ct. 481, 487 (1997).

Dated: June 21, 1999.

Respectfully submitted,

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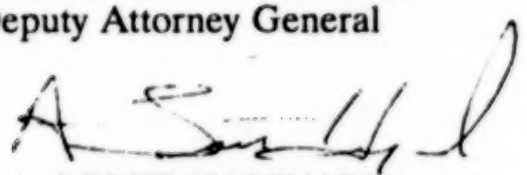

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No. 98-6322-CFH Title: Antonio Tonton Slack, Petitioner
v.
Eldon McDaniel, Warden, et al.

Docketed: October 6, 1998 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Oct 5 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 5, 1998)
	Oct 30 1998	Waiver of right of respondents Eldon McDaniel, Warden, et al. to respond filed.
	Nov 5 1998	DISTRIBUTED. November 25, 1998
	Nov 12 1998	Response requested.
	Dec 10 1998	Brief of respondents Eldon McDaniel, Warden, et al. in opposition filed.
	Dec 16 1998	Reply brief of petitioner Antonio T. Slack filed.
	Dec 31 1998	REDISTRIBUTED. January 15, 1999
	Jan 19 1999	REDISTRIBUTED. January 22, 1999
	Feb 12 1999	REDISTRIBUTED. February 19, 1999
	Feb 22 1999	Petition GRANTED. limited to the following question: If a person's petition for habeas corpus under 28 U. S. C. Sec. 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the Sec. 2254 petition, are claims included within that petition that were not included within his initial Sec. 2254 filing "second or successive" habeas applications? SET FOR ARGUMENT October 4, 1999. **********
	Mar 10 1999	Motion of petitioner for appointment of counsel filed.
	Mar 29 1999	DISTRIBUTED. April 2, 1999 (Page 16)
	Apr 1 1999	Joint appendix filed.
	Apr 2 1999	Order extending time to file brief of petitioner on the merits until April 22, 1999.
	Apr 5 1999	Motion for appointment of counsel GRANTED and it is ordered that Michael Pescetta, Esquire, of Las Vegas, Nevada, is appointed to serve as counsel for the petitioner in this case.
	Apr 21 1999	Brief amicus curiae of Rutherford Institute filed.
	Apr 22 1999	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Apr 22 1999	Brief of petitioner Antonio T. Slack filed.
	May 11 1999	Order extending time for filing resondents' brief on the merits to and including June 21, 1999.
	Jun 21 1999	Brief of respondents Eldon McDaniel, Warden, et al. filed.
	Jun 21 1999	Brief amici curiae of California, et al. filed.
	Jul 20 1999	Application (99A86) to extend time to file petitioner's reply brief on the merits, submitted to Justice O'Connor.
	Jul 22 1999	Application (99A86) granted by Justice O'Connor extending the time to file until August 2, 1999.
	Aug 2 1999	Reply brief of petitioner Antonio T. Slack filed.

No. 98-6322-CFH

Entry	Date	Proceedings and Orders
	Aug 13 1999	CIRCULATED.
	Oct 4 1999	ARGUED.
	Oct 18 1999	This case is restored to the calendar for reargument. The parties are directed to file supplemental briefs notto exceed 25 pages addressing the following questions: (1) Do the provisions of AEDPA, specifically including 28 U.S.C. Sec. 2253 (c) and 28 U.S.C. Sec. 2244 (b), control the proceedings on appeal? (2) If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. Sec. 2253 (c)? Briefs are to be filed with the Clerk and served upon opposing parties on or before 3 p.m., Wednesday, December 15, 1999. Reply briefs, if any, not to exceed 10 pages are to be filed with the Clerk and served upon opposing parties on or before 3 p.m., Friday, January 14, 2000. The Solicitor General is invited to file a brief, not to exceed 25 pages, expressing the views of the United States. Any brief as amicus curiae, not to exceed 15 pages, may be filed with the Clerk and served upon the parties on or before 3 p.m., Wednesday, December 15, 1999. Rule 29.2 does not apply.
	Dec 8 1999	Record filed.
	Dec 10 1999	Supplemental brief of respondents E.K. McDaniel, Warden, et al. filed.
	Dec 14 1999	Brief amici curiae of California, et al. filed.
	Dec 14 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Dec 15 1999	Supplemental brief of petitioner Antonio T. Slack filed.
	Dec 15 1999	Brief amicus curiae of United States filed.
	Dec 22 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 7 2000	SET FOR REARGUMENT ON MARCH 29, 2000.
	Jan 12 2000	Supplemental brief of respondents filed.
	Jan 14 2000	Reply brief of petitioner Antonio T. Slack (supplemental) filed.
	Jan 18 2000	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 29 2000	ARGUED.

BEST AVAILABLE COPY

DEC 15 1999

Supreme Court, U.S.
FILED
DEC 15 1999

No. 98-6322

In the Supreme Court of the United States

ANTONIO TONTON SLACK, PETITIONER

v.

ELDON MCDANIEL, WARDEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Court has invited the Solicitor General to express the views of the United States on the following questions:

1. Do the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), specifically including 28 U.S.C. 2253(c) and 28 U.S.C. 2244(b) (Supp. III 1997), control the proceedings on appeal?

2. If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. 2253(c) (Supp. III 1997)?

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In the Supreme Court of the United States

No. 98-6322

ANTONIO TONTON SLACK, PETITIONER

v.

ELDON MCDANIEL, WARDEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

In 1990, petitioner was convicted of second degree murder with the use of a deadly weapon in violation of Nevada law and sentenced to life imprisonment with the possibility of parole. J.A. 25. The Nevada Supreme Court dismissed his appeal. J.A. 3-4.

In 1991, petitioner filed a pro se petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the District of Nevada. J.A. 6 (*Slack* v. *Director*, Case No. CV-N-91-561-HDM). The district court dismissed the petition without prejudice for failure to exhaust all state remedies. J.A. 21-22. Petitioner then filed a petition for post-conviction relief in state trial court. J.A. 25. The state trial court denied

the petition, J.A. 24-30, and the Nevada Supreme Court dismissed petitioner's appeal, J.A. 31-33.

On May 30, 1995, petitioner returned to federal court and filed a pro se petition for writ of habeas corpus under 28 U.S.C. 2254. J.A. 35 (*Slack* v. *McDaniel*, Case No. CV-N-95-00194-DWH). On October 8, 1996, he filed an amended petition. J.A. 96. On February 13, 1997, the district court appointed counsel and ordered him to file an amended petition or a notice indicating his intent to proceed with the first amended petition. J.A. 64-65. On June 10, 1997, petitioner filed a second amended petition. Pet. App. 190. On December 3, 1997, acting on respondents' motion for a more definite statement, the district court gave petitioner 20 days to file a third amended petition. *Id.* at 196.

On December 24, 1997, petitioner sought (and the district court subsequently granted) leave to file a third amended petition. J.A. 66. On March 30, 1998, the district court dismissed several of the claims in the third amended petition for abuse of the writ because petitioner had not included those claims in his 1991 federal habeas petition. J.A. 152, 156. The court dismissed the remainder of the petition without prejudice because one of the remaining claims had still not been exhausted. J.A. 157-158.

In taking those actions, the court determined that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which went into effect on April 26, 1996, "is not applicable to this case" because the case "was commenced March 27, 1995." J.A. 156. The court therefore applied the pre-AEDPA abuse-of-the-writ doctrine reflected in Rule 9(b) of the Rules Governing Section 2254 Cases. J.A. 156.

On April 29, 1998, petitioner filed a notice of appeal, J.A. 161, and, on May 11, 1998, he applied for a certificate of probable cause, J.A. 163. The district court denied the certificate. J.A. 182-183. The Ninth Circuit assigned the case docket number 98-15943. See App., *infra*, 1a. On July 7, 1998, a two-judge panel of that court denied the certificate, and the court entered that judgment on its docket. *Id.* at 2a.

On February 22, 1999, this Court granted the petition for a writ of certiorari limited to the following question:

> If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust his state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing "second or successive" habeas applications?

J.A. 198. That question was briefed, and the case was argued on October 4, 1999. On October 18, 1999, the Court restored the case to the calendar for reargument and called for briefing on whether 28 U.S.C. 2253(c) and 28 U.S.C. 2244(b) (Supp. III 1997) of AEDPA control the proceedings on appeal, and if so, whether a certificate of appealability may issue under 28 U.S.C. 2253(c) (Supp. III 1997).

SUMMARY OF ARGUMENT

I. This Court has determined that the general amendments to the law of habeas corpus in Chapter 153 of Title 28, United States Code, made by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or Act), Pub. L. No. 104-132, 110 Stat. 1214, were not made applicable to habeas cases pending on the date of enactment of AEDPA. *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997). The Court reached that result by drawing an inference from AEDPA's Section 107(c):

since Congress specifically provided that Chapter 154's provisions for habeas review of certain state capital cases were made applicable to "cases pending on or after the date of enactment of this Act," § 107(c), 110 Stat. 1226, Congress did not intend the Chapter 153 amendments to apply to pending cases. The first question here is whether two of the provisions of Chapter 153 as amended by AEDPA, 28 U.S.C. 2253(c) and 28 U.S.C. 2244(b) (Supp. III 1997), are applicable to the appellate proceedings. Petitioner here filed his underlying habeas petition before enactment of AEDPA, but amended it to include new claims, and sought to appeal the district court's dismissal of those claims, after enactment of AEDPA.

Lindh's analysis and general principles of habeas law indicate that AEDPA's requirement that a petitioner obtain a certificate of appealability (COA), Section 2253(c), is applicable to petitioner's appellate proceedings. As this Court made clear in *Hohn* v. *United States*, 524 U.S. 236 (1998), an application for a certificate of appealability is itself a "case," and that case is not "pending" until leave to appeal is requested. The negative implication of Section 107(c), *i.e.*, that the provisions of Chapter 153 are not applicable to pending cases, is therefore not relevant to applications for authorization to appeal that are made *after* the effective date of AEDPA.

The same cannot be said, however, about the second-or-successive provisions of amended Section 2244(b). Those provisions include substantive restrictions on when second or successive habeas applications may be made and procedural requirements that establish a gatekeeping mechanism administered by the courts of appeals. If a habeas petition is filed before AEDPA's effective date, none of those provisions of Section

2244(b) is applicable, even if the habeas petitioner seeks to appeal after AEDPA's effective date. To hold otherwise would mean that the district court's adjudication of the case under pre-AEDPA law, as required under *Lindh*, would be nullified by appellate review under AEDPA's new legal standards. If, however, a second or successive habeas application is initiated after AEDPA's effective date, that "case" is controlled by Section 2244(b).

The issue here is whether petitioner's new claims in his post-AEDPA amended petition can properly be treated as a separate "case" that is subject to AEDPA's restrictions on second or successive petitions. In our view, they cannot. Such treatment is inconsistent with the usual meaning of "case," which applies to an entire proceeding rather than to separate claims for relief within it. It is also inconsistent with AEDPA's separate use of the terms "case" and "claim" and with traditional habeas practice, which has not treated amendments to a habeas petition as second or successive petitions.

II. If AEDPA's COA provisions are applicable, the second question presented is whether a COA may issue when a petitioner argues that the district court committed a non-constitutional procedural error that foreclosed consideration of an underlying constitutional claim arising from the state criminal proceedings. Under AEDPA, a COA may issue only if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). That showing has two components: first, that the petitioner's underlying habeas case contains a claim of a constitutional violation that is "debatable among jurists of reason," *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (per curiam), and, second, if procedural obstacles exist that may bar relief

on that claim, that there is a reasonably debatable argument that the petitioner can surmount those procedural obstacles.

Because of those requirements, a petitioner who claims that the district court has denied his habeas application on procedural grounds cannot obtain a COA simply because the procedural ruling is reasonably open to question; that, standing alone, would not demonstrate a "substantial showing of the denial of a constitutional right." By the same token, however, the fact that the procedural ruling on which the district court denied relief is non-constitutional in character does not preclude the issuance of a COA. If there is a possibly meritorious claim of constitutional error in the state criminal proceedings, and the claim of procedural error by the habeas court is reasonably debatable, a COA may issue to decide whether adjudication of the underlying constitutional claim was foreclosed by the habeas court's procedural error.

ARGUMENT

I. AEDPA'S CERTIFICATE OF APPEALABILITY PROVISIONS APPLY TO THE PROCEEDINGS IN THE COURT OF APPEALS, BUT AEDPA'S PROVISIONS GOVERNING SECOND OR SUCCESSIVE PETITIONS DO NOT

Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or Act), Pub. L. No. 104-132, 110 Stat. 1214, made substantial revisions to federal law governing petitions for collateral relief. Sections 101 through 106 of AEDPA amended 28 U.S.C. 2244 and 2253-2255 (collectively, Chapter 153), which generally govern post-conviction review proceedings in

federal courts.[1] 110 Stat. 1217-1221. Section 107 created a new Chapter 154 concerning habeas proceedings in state capital cases. Chapter 154 contains more stringent procedural and substantive limitations on relief in capital cases but is applicable only if the State meets certain conditions. 110 Stat. 1221-1226. Congress provided, in Section 107(c) of AEDPA, that "Chapter 154 * * * shall apply to cases pending on or after the date of enactment of this Act." 110 Stat. 1226.

In *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997), this Court held that the negative implication of Section 107(c) is that AEDPA's amendments to Chapter 153 "generally apply only to cases filed after the Act became effective," April 24, 1996. The Court specifically held that amended Section 2254(d) in Chapter 153, which prescribes standards for granting federal habeas relief to a state prisoner, did not apply to Lindh, who had filed his habeas petition and his appeal before AEDPA's enactment. 521 U.S. at 322-323. The Court did not provide further clarification concerning when a "case" is "pending" within the meaning of Section 107(c) so that the amendments to Chapter 153 do not apply to it.

Petitioner here filed his petition for habeas corpus before the advent of AEDPA, but, unlike in *Lindh*, the petition was amended to add new claims, and appellate proceedings were commenced, after the advent of AEDPA. The question before the Court is whether those post-AEDPA events trigger the applicability of two of AEDPA's provisions: the certificate of appealability (COA) provisions, which control whether a

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[1] Citations in this brief to sections of Title 28 of the United States Code are to Supplement III 1997, unless otherwise indicated.

habeas petitioner may bring an appeal to the court of appeals, 28 U.S.C. 2253(c), and the provisions governing the filing of a second or successive application for habeas relief, 28 U.S.C. 2244(b). We believe that the COA provisions are applicable to petitioner's appeal-authorization proceedings, but AEDPA's second-or-successive provisions are not.

A. The COA Provisions In Amended 28 U.S.C. 2253(c) Apply To The Proceedings In The Court Of Appeals

As amended by AEDPA, 28 U.S.C. 2253(c) provides that "an appeal may not be taken to the court of appeals" from the denial of a petition for collateral relief filed by a state or federal prisoner, "[u]nless a circuit justice or judge issues a [COA]." Section 2253(c) further provides that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). The COA requirements govern only the threshold screening proceeding in which a petitioner seeks authorization to appeal; they have no application to the underlying collateral relief proceedings in district court.

The application for a certificate, rather than the case in district court, is thus the relevant "case" for purposes of applying to the COA provisions the negative implication of AEDPA's Section 107(c). In *Hohn* v. *United States*, 524 U.S. 236, 241 (1998), this Court held that an "application for a [COA] constitutes a case under [28 U.S.C. 1254(1) (1994)]," which gives the Court jurisdiction to review "[c]ases in the courts of appeals" (*ibid.*). It is logical to apply the same approach to hold that the application for a COA is also a case within the meaning of Section 107(c). As the Eighth Circuit explained in *Tiedeman* v. *Benson*, 122 F.3d 518, 521 (1997), there is "no reason why a new provision exclu-

sively directed towards appeal procedures would depend for its effective date on the filing of a case in a trial court, instead of on the filing of a notice of appeal or similar document." In accord with that reasoning, this Court has applied amendments to the Federal Rules of Appellate Procedure to "all proceedings in *appellate cases* thereafter commenced." 517 U.S. 1257 (1996) (emphasis added).[2]

Treating an application for a certificate as the relevant "case" under Section 107(c) is consistent with that term's ordinary legal meaning. "Case" is "[a] general term for an action, cause, suit, or controversy, at law or in equity" and includes "*any* proceeding judicial in its nature." *Black's Law Dictionary* 215 (6th ed. 1990) (emphasis added). See also *Random House Dictionary of the English Language* 321 (2d ed. 1987) ("10. *Law*: a suit or action at law"). The analysis in this Court's precedent supports the same approach. The Court in *Hohn* did not attach any special meaning to the term "case" in Section 1254(1) but instead relied on the term's usual meaning. See 524 U.S. at 241 (citing *Blyew* v. *United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("case" is "a proceeding in court, a suit, or action")). The Court also observed that the courts of appeals treat applications for certificates as they treat other cases, *i.e.*, by assigning a docket number, sub-

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[2] The Court has also applied those amendments, "insofar as just and practicable, [to] all proceedings in appellate cases then pending." 517 U.S. 1257 (1996). That action reflects the principle that new procedural rules may generally be applied to pending litigation provided they were enacted before the phase of the case to which they apply. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 275 & n.29 (1994).

mitting the matter to a panel, and entering judgment. 524 U.S. at 242.[3]

An application for a COA is "pending" within the meaning of Section 107(c) once the application or a notice of appeal is filed. See Fed. R. App. P. 22(b) ("If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals."); *Black's Law Dictionary* 1134 (6th ed. 1990) ("[A]n action or suit is 'pending' from its inception until the rendition of final judgment."); *Ex parte Quirin*, 317 U.S. 1, 24 (1942) ("Presentation of the petition for judicial action is the institution of a suit.").

Petitioner filed his notice of appeal on April 29, 1998, and applied for a certificate of probable cause (CPC) (the pre-AEDPA predecessor to a COA) on May 11, 1998. J.A. 161, 163. Because neither his notice of appeal nor his application for a certificate had been filed by AEDPA's effective date, his "case" seeking authorization to appeal was not "pending" at that time. Therefore, the negative implication of Section 107(c), which the Court relied on in *Lindh*, does not preclude application of the COA provisions to the proceedings in the court of appeals.[4]

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[3] The application here, although handled under pre-AEDPA procedures requiring a certificate of probable cause, followed the same course: the court of appeals assigned petitioner's application a separate docket number, distinct from his district court case, and entered judgment on that application. Compare p. 3, *supra* (No. 98-15943) with p. 2, *supra* (No. CV-N-95-00194-DWH).

[4] Aside from the Eighth Circuit, the courts of appeals have not agreed with our view that the applicability of AEDPA's COA provisions depends on the date on which the notice of appeal or application for a certificate was filed. Those courts have focused instead on the date when the underlying habeas case was filed. See, *e.g.*, *United States* v. *Kunzman*, 125 F.3d 1363, 1364 n.2 (10th Cir. 1997), cert. denied, 523 U.S. 1053 (1998); *United States* v. *Skandier*, 125 F.3d 178, 182 (3d Cir. 1997). As discussed above, that view is incorrect because it fails to recognize the distinct "case" that is commenced when a habeas petitioner seeks to initiate proceedings in the court of appeals. We note that the Eighth Circuit has declined to extend its holding in *Tiedeman*, which involved a state prisoner, to cases involving federal prisoners. See *United States* v. *Navin*, 172 F.3d 537 (1999). The court concluded that, because federal prisoners, unlike state prisoners, did not need authorization in order to appeal before enactment of AEDPA, applying the COA requirement to federal prisoners with petitions pending in district court when AEDPA was enacted would present retroactivity concerns. *Id.* at 539. As we explain in the text following this note, application of the certificate requirement to prisoners who initiated appellate proceedings after AEDPA's enactment is not retroactive.

Nor would application of the COA provisions to those proceedings have "retroactive effect." *Landgraf* v. *USI Film Prods.*, 511 U.S. 249, 280 (1994). The requirement that petitioner obtain a COA was in place before petitioner was obliged to seek one. Indeed, petitioner addressed whether AEDPA applied in his application for a CPC. See J.A. 166-167. Application of the COA provisions is therefore prospective and raises no retroactivity concerns.

Finally, the COA requirement applies to the proceedings in the court of appeals whether or not respondents properly preserved the claim that it applies. Section 2253(c) provides that "an appeal may not be taken to the court of appeals" absent a COA. In *Hohn*, this Court termed issuance of a COA "a threshold prerequisite for court of appeals jurisdiction." 524 U.S. at 248. That view accords with the Court's long-standing position that the absence of a CPC deprived an appellate court of the power to review a denial of habeas corpus relief. See, *e.g.*, *Bilik* v. *Strassheim*, 212

U.S. 551 (1908) (dismissing appeal for want of jurisdiction, under Act of March 10, 1908, ch. 76, 35 Stat. 40, a forerunner of Section 2253(c), which required certification of probable cause before appeal to this Court from the denial of a habeas petition). And it comports with the Court's holding that the courts of appeals lack jurisdiction over an appeal absent the filing of a timely, proper notice of appeal. See *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); *United States* v. *Robinson*, 361 U.S. 220, 224 (1960). Appellate courts must consider jurisdictional limits on their power on their own initiative, and those limits cannot be waived or forfeited. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).[5]

B. The Provisions Restricting The Filing Of Second Or Successive Petitions In Amended 28 U.S.C. 2244(b) Do Not Apply To Petitioner's Third Amended Petition

As amended by AEDPA, 28 U.S.C. 2244(b) imposes limitations on the filing of a "second or successive habeas corpus application." Those limitations include both substantive standards that determine when a claim presented in a second or successive application may form the basis for habeas relief, Section 2244(b)(1) and (2), and a procedural gatekeeping provision that requires authorization by a court of appeals before a second or successive application may be filed in a district court, Section 2244(b)(3). See *Felker* v. *Turpin*, 518 U.S. 651, 656-657 (1996). The question here is

[5] Cases holding that other, non-jurisdictional provisions of AEDPA, such as 28 U.S.C. 2254(d), may be forfeited (*e.g.*, *Arnold* v. *Evatt*, 113 F.3d 1352, 1362 n.57 (4th Cir. 1997), cert. denied, 522 U.S. 1058 (1998); *Emerson* v. *Gramley*, 91 F.3d 898, 900 (7th Cir. 1996), cert. denied, 520 U.S. 1122, 520 U.S. 1139 (1997)) do not alter that conclusion.

whether the proceedings on appeal, which were initiated after the effective date of AEDPA, are controlled by Section 2244(b). We believe that they are not. Unlike the COA provisions, which are exclusively concerned with initiating an appellate case, the provisions in Section 2244(b) affect the entire course of the collateral relief proceedings, including the prisoner's ability to file his petition for collateral relief in the district court. See *Felker*, 518 U.S. at 662-663. Accordingly, when a habeas petition is filed before the effective date of AEDPA, none of Section 2444(b) is applicable to it. That is true even when the habeas petitioner seeks leave to appeal after the effective date of AEDPA. To hold otherwise would mean that the district court's determination of the case would be governed by pre-AEDPA law, under *Lindh*, but the appellate court would review the district court's decision under the different legal standards of AEDPA. That result would essentially nullify Congress's intention to apply Chapter 153 only to habeas cases that were not pending at the time of AEDPA's enactment. In contrast, when a habeas petitioner seeks to initiate a second or successive habeas application after AEDPA's effective date, that habeas "case" is controlled by Section 2244(b).

Here, petitioner's case was "pending" once he filed his petition for collateral relief in the district court on May 30, 1995. See *Ex parte Quirin*, *supra*; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 112-113 (1866) (cause commences when habeas petition is filed); 28 U.S.C. 2254(e)(1) (discussing "a proceeding instituted by an application for a writ of habeas corpus"); 28 U.S.C. 1914(a) (requiring the filing fee for "instituting any civil action" to be paid "on application for a writ of habeas corpus"). That view is consistent with ordinary civil

practice, see Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."), which informs proper procedure in habeas cases. See Rule 11 of the Rules Governing Section 2254 Cases. And the majority of the courts of appeals look to the date on which the petition was filed in district court to determine whether AEDPA applies.[6]

Because petitioner's case in district court was pending when AEDPA was enacted, the negative implication of Section 107(c) recognized in *Lindh*, *supra*, dictates that amended 28 U.S.C. 2244(b) does not apply to petitioner's third amended habeas petition. Respondents (Supp. Br. 9) suggest that a different result is warranted because the third amended petition was filed

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[6] See, *e.g.*, *Gosier* v. *Welborn*, 175 F.3d 504, 506 (7th Cir.), cert. denied, 120 S. Ct. 502 (1999); *Graham* v. *Johnson*, 168 F.3d 762, 775 (5th Cir. 1999), petition for cert. pending, No. 98-10002; *Williams* v. *Coyle*, 167 F.3d 1036, 1039-1040 (6th Cir. 1999); *Mancuso* v. *Herbert*, 166 F.3d 97, 101 (2d Cir.), cert. denied, 119 S. Ct. 2376 (1999); *United States* v. *Marmolejos*, 140 F.3d 488, 489 n.1 (3d Cir. 1998); *Pratt* v. *United States*, 129 F.3d 54, 58 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998). Petitioner's case was not pending before his May 30 application was filed, even though he first filed a federal habeas petition in 1991, because the 1991 petition was dismissed before enactment of AEDPA. See, *e.g.*, *Libby* v. *Magnusson*, 177 F.3d 43, 46 (1st Cir. 1999); *Graham*, 168 F.3d at 782; *Mancuso*, 166 F.3d at 101. The Ninth Circuit has held that, in capital cases in which the prisoner moves for appointment of counsel before filing a habeas petition, a case is pending under AEDPA Section 107(c) once the motion for counsel is filed. *Calderon* v. *United States Dist. Court for the Cent. Dist. of Cal. (Kelly)*, 163 F.3d 530, 540 (1998) (en banc), cert. denied, 119 S. Ct. 1377 (1999). We disagree with the Ninth Circuit that a motion for appointment of counsel commences a habeas "case" within the meaning of Section 107(c), but this Court need not address that question here, because petitioner, who is not a capital prisoner, filed his habeas petition before he moved for counsel. See J.A. 35, 56.

after AEDPA's enactment. Respondents (*id.* at 15) and their amici States (Br. Amici Curiae States of Cal. *et al.* at 8, 11 (June 23, 1999)) argue that this Court should construe "case" as used in Section 107(c) and *Lindh* in a "claim-specific fashion," so that pre-AEDPA law applies to *claims* pending on AEDPA's enactment, and AEDPA governs *claims* presented after its enactment. We do not agree.

The suggestion that a "claim" is a "case" finds no support in the ordinary meaning of the word "case." In ordinary usage, "case" refers to a judicial proceeding rather than a specific pleading or claim in that proceeding. See p. 9, *supra* (citing dictionary definitions for "case"). This Court has construed "case" in precisely that manner. See *Hohn*, 524 U.S. at 241 ("a proceeding seeking relief for an immediate and redressable injury"); *Blyew*, 80 U.S. (13 Wall.) at 595 ("a proceeding in court, a suit, or action").

The suggestion is also inconsistent with Congress's use of the words "case" and "claim" in other provisions of AEDPA. See, *e.g.*, 28 U.S.C. 2244(b) and (d)(1); 28 U.S.C. 2254(d) and (e)(2); 28 U.S.C. 2255; 28 U.S.C. 2261(a), (d) and (e); 28 U.S.C. 2262(c); 28 U.S.C. 2264; 28 U.S.C. 2265 (b) and (c); 28 U.S.C. 2266(b)(1). When Congress used "case" in other provisions of AEDPA, Congress used that word in its ordinary sense, to refer to a judicial proceeding or action. See, *e.g.*, 28 U.S.C. 2244(b)(2)(A) ("a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"); 28 U.S.C. 2261(e) ("a capital case"); 28 U.S.C. 2262(c) ("no Federal court thereafter shall have the authority to enter a stay of execution in the case"); 28 U.S.C. 2265(c) ("cases involving a sentence of death"); 28 U.S.C. 2266(b)(1)(B) (if necessary, district court shall afford a hearing before "submission of the

case for decision"). Congress used the word "claim," however, to refer to a legal basis for relief within a case. See, *e.g.*, 28 U.S.C. 2244(b)(1) and (2) ("[a] claim presented in a second or successive habeas corpus application"); 28 U.S.C. 2254(e)(2) (if applicant "failed to develop the factual basis of a claim in State court proceedings," court shall not hold an evidentiary hearing unless specified conditions are met). If Congress had meant AEDPA's application to turn on whether a particular claim was pending on enactment rather than on whether the habeas proceeding was pending, Congress presumably would have used "claim" rather than "case" in Section 107(c). Because it did not, Section 107(c)'s negative implication applies to a habeas "case," not a habeas "claim."

Finally, respondents' interpretation of "case" is inconsistent with traditional habeas practice. Courts have not viewed amendments to pending habeas petitions as new cases subject to the limitations on second or successive petitions, but instead have permitted amendments under Federal Rule of Civil Procedure 15. See *Johnson* v. *United States*, No. 97-2519, 1999 WL 1022126, *3 (7th Cir. Nov. 10, 1999); *Bonin* v. *Calderon*, 59 F.3d 815, 845-846 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996); see also *Calderon* v. *Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring).[7] In AEDPA,

[7] By contrast, the abuse-of-the-writ standard has been held to apply once the court has disposed of the habeas petition; for example, to a motion to recall the mandate after judgment, see *Calderon* v. *Thompson*, 523 U.S. 538, 553 (1998), and to a motion to amend judgment under Federal Rule of Civil Procedure 60(b); see, *e.g.*, *In re Medina*, 109 F.3d 1556, 1561 (11th Cir.), cert. denied, 520 U.S. 1151 (1997). Although here the Ninth Circuit applied the abuse-of-the-writ standard to some of the claims that petitioner added in his third amended petition, the court did so not based on the fact that those claims were amendments to petitioner's May 30 petition, but based on the fact that petitioner had filed a petition in 1991 that had been dismissed for failure to exhaust state remedies. See p. 2, *supra*.

Congress implicitly endorsed the traditional approach for non-capital cases when it subjected only amendments in capital cases under the new Chapter 154 to AEDPA's limitations on second or successive petitions. See 28 U.S.C. 2266(b)(3)(B).[8] Moreover, district courts do not assign separate docket numbers when prisoners file amendments to pending petitions, as this case illustrates. See p. 2, *supra* (all three amended petitions recorded under docket number assigned on filing of initial petition). Respondents and their amici have not identified, nor have we found, any court of appeals decision interpreting Section 107(c) and *Lindh* as they advocate.

Amici correctly point out that their theory would enable the courts to avoid some anomalous results that might occur in cases in which a petition for collateral relief was filed shortly before enactment of AEDPA and amended thereafter. See Br. Amici Curiae States of Cal. *et al.* at 8-9 (June 23, 1999). But bright-line rules often generate similar anomalies, and courts should not seek to avoid them by disregarding traditional principles of statutory construction. Moreover, any anomalies that might occur here would be transitory and would end with the disposal of those petitions pending when AEDPA was enacted. And respondents' approach has its own practical flaw: it would require

[8] That provision states: "No amendment to an application for a writ of habeas corpus under this chapter [154] shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b)," the provision governing second and successive habeas applications.

district courts to apply different versions of the same provisions of law to different claims in the same case, an administratively burdensome task that Congress should not lightly be presumed to have imposed.[9]

If the Court concludes that the COA requirement of AEDPA applies to petitioner's proceedings in the court of appeals but amended Section 2244(b) does not apply, the Court will then be presented with the question whether a COA may issue. We now turn to that question.[10]

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[9] One could arrive at an outcome similar to the one produced by the theory of respondents and the amici States by reasoning that, although petitioner's case was pending before enactment of AEDPA, that case includes only the claims in the May 30, 1995, petition and any claims added by amendment that "relate[] back" to that filing under Federal Rule of Civil Procedure 15(c). Under that reasoning, claims in the third amended petition that do not arise out of the "conduct, transaction, or occurrence" (*ibid.*) described in the May 30 petition are not part of the case pending before AEDPA's enactment; instead, they are a new case subject to the requirements of amended Section 2244(b). That approach would be even more complex than the one proposed by respondents and the amici States, and it should likewise be rejected. Section 107(c)'s reference to "cases pending" gives no indication that Congress intended the scope of those cases to be defined by Rule 15(c)'s relation back principle, which primarily applies in the statute-of-limitations context. See Fed. R. Civ. P. 15(c)(1) (allowing relation back when "permitted by the law that provides the statute of limitations applicable to the action"); Fed. R. Civ. P. 15(c) Advisory Committee Notes On 1966 Amendment ("Relation back is intimately connected with the policy of the statute of limitations."); *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 150 n.3 (1984) ("The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.").

[10] On the other hand, if the Court agrees with respondents and their amici States that amended Section 2244(b) applies, then

II. A COA MAY NOT ISSUE UNLESS REASONABLE JURISTS COULD CONCLUDE BOTH THAT THE HABEAS PETITION IS NOT BARRED BY ABUSE OF THE WRIT AND THAT IT PRESENTS A CONSTITUTIONAL CLAIM ON WHICH PETITIONER COULD PREVAIL

Under AEDPA, a court may issue a COA only if an applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Consistent with pre-AEDPA law, a substantial showing requires an applicant to demonstrate that his right to relief on a claim in his habeas petition (including his ability to overcome any procedural obstacle to relief) is "debatable among jurists of reason." *Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (per curiam). In a departure from pre-AEDPA law, the COA requirement permits appeal only when the showing is made as to a "constitutional

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presumably the gatekeeping provision of that Section, under which second or successive habeas applications may not be filed in district court without leave of the court of appeals, applies as well. See 28 U.S.C. 2244(b)(3)(A). Because of the prohibition in 28 U.S.C. 2244(b)(3)(E) against certiorari review of gatekeeping decisions, it would not be appropriate for this Court to treat the court of appeals' disposition in this case as a gatekeeping determination. Rather, the Court should either remand the case to the court of appeals with instructions to construe petitioner's notice of appeal as a gatekeeping motion, see, *e.g.*, *Pratt* v. *United States*, 129 F.3d 54, 59 (1st Cir. 1997), cert. denied, 523 U.S. 1123 (1998), or dismiss the petition for a writ of certiorari and allow petitioner to pursue any remedies he might have under Section 2244(b), such as formally filing a gatekeeping motion in the court of appeals. In passing on a gatekeeping motion, that court could decide whether petitioner's claims are "second or successive" within the meaning of Section 2244(b). Cf. *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641-642 (1998).

right" rather than a "federal right." See *Barefoot* v. *Estelle*, 463 U.S. 880, 893 (1983).

1. The reference to a "constitutional" right in Section 2253(c)(2) requires that the underlying petition for collateral relief raise a constitutional claim, rather than a claim based on a federal statute or treaty, the other two bases for habeas relief, see 28 U.S.C. 2254(a). *Young* v. *United States*, 124 F.3d 794, 798-799 (7th Cir. 1997), cert. denied, 524 U.S. 928 (1998); *Murphy* v. *Netherland*, 116 F.3d 97, 99-100 (4th Cir.), cert. denied, 521 U.S. 1144 (1997).[11] The elimination of statutory and treaty-based claims from the appellate process is consistent with AEDPA's general purpose of streamlining habeas corpus review and with the certificate requirement's longstanding purpose of rooting out frivolous appeals. See 141 Cong. Rec. S4590-S4593 (daily ed. Mar. 24, 1995) (Sen. Specter); 141 Cong. Rec. H1400 (daily ed. Feb. 8, 1995) (Rep. McCollum); *id.* at H1402 (Rep. Young); *Barefoot*, 463 U.S. at 892, 893 n.3. Although some habeas petitions have invoked treaties, *e.g.*, *Breard* v. *Greene*, 523 U.S. 371 (1998), or federal statutes, *e.g.*, *Reed* v. *Farley*, 512 U.S. 339 (1994), collateral relief for non-constitutional violations is available only to rectify a "complete miscarriage of justice" or an "omission inconsistent with the rudiment[s] of fair procedure." See *Reed*, 512 U.S. at 348. Because few statutory or treaty claims meet that demanding

[11] Some courts of appeals have suggested that the substitution of "constitutional" for "federal" was not intended to alter the pre-AEDPA standard. See, *e.g.*, *Green* v. *Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997); *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir.), cert. denied, 520 U.S. 1224 (1997). The language of Section 2253(c)(2) makes that view untenable.

standard, appeals raising those claims are unlikely to succeed. See *Young*, 124 F.3d at 799.

2. The requirement in Section 2253(c)(2) that the prisoner's showing be "substantial" means that his right to prevail on the claim must be "debatable among jurists of reason." See *Barefoot*, 463 U.S. at 893 n.4; *Lozada*, 498 U.S. at 432. An applicant cannot make that showing if there is a clear procedural obstacle to his right to relief, even if there is merit to his underlying claim. Thus, when there may be a procedural bar to recovery, an applicant for a certificate must demonstrate that *both* the merits of his underlying claim *and* his ability to overcome the procedural obstacle are subject to reasonable debate. See, *e.g.*, *Morris* v. *Horn*, 187 F.3d 333, 340 (3d Cir. 1999); *Murphy* v. *Johnson*, 110 F.3d 10, 11 (5th Cir. 1997).

Congress could not have intended to permit appeals based solely on the abstract merit of an underlying claim if relief on that claim would clearly be procedurally barred. To allow such appeals would frustrate the certificate's core purpose of curbing meritless appeals. Therefore, before and after AEDPA, courts of appeals have held that a prisoner may not obtain appellate review of the merits of a petition for collateral relief unless it is at least arguable that he can overcome procedural obstacles to relief. See *Murphy* v. *Netherland*, 116 F.3d at 101; *Tucker* v. *Johnson*, 115 F.3d 276, 281 (5th Cir.), cert. denied, 522 U.S. 1017 (1997); *Murphy* v. *Johnson*, 110 F.3d at 11; *Hogan* v. *Zavaras*, 93 F.3d 711, 712 (10th Cir. 1996); *Sterling* v. *Scott*, 57 F.3d 451, 453 (5th Cir. 1995), cert. denied, 516 U.S. 1050 (1996). We are aware of no decision to the contrary.

3. Several courts of appeals have held, however, that they may review a procedural ruling denying collateral relief without a showing that an underlying constitu-

tional claim has potential merit. See, *e.g.*, *Gaskins* v. *Duval*, 183 F.3d 8, 9 n.1 (1st Cir. 1999); *Thomas* v. *Greiner*, 174 F.3d 260 (2d Cir. 1999); *Nichols* v. *Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999) (en banc); *Whitehead* v. *Johnson*, 157 F.3d 384, 388 (5th Cir. 1998). We do not believe that those decisions can be reconciled with the plain language of Section 2253(c), which makes "a substantial showing of the denial of a *constitutional* right" a prerequisite to an appeal from "*the final order* in a habeas corpus proceeding." 28 U.S.C. 2253(c) (emphasis added). An erroneous procedural ruling by the habeas court, standing alone, does not meet that standard.[12] Nor would review of a procedural ruling, absent the existence of a potentially meritorious underlying claim, accord with the COA requirement's purpose of rooting out insubstantial appeals. There is no need to correct a district court's procedural error when that error prevents consideration of only meritless claims.

On the other hand, we do not agree with the view that a COA can *never* issue when a district court denies collateral relief on procedural grounds because that adverse procedural ruling does not deny any constitutional right. Resp. Supp. Br. 22-23; Br. Amicus Curiae States of Cal. *et al.* at 21 (June 23, 1999). We are not aware of any court of appeals that has adopted that view.[13] Nor does the text of Section 2253(c) support it.

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[12] Conceivably, a procedural error of constitutional dimension in the habeas proceedings might constitute the denial of a "constitutional right." Although Section 2253(c) could be read to cover that situation, the normal focus of a habeas petition, and any appeal, is on redressing the claimed denial of rights in the underlying state criminal process.

[13] Instead, appellate courts have continued to review procedural issues, sometimes explicitly holding that they have the power to do so, as in the cases we cite on pages 21-22, *supra*, and, at other times, implicitly assuming that power, see, *e.g.*, *Breard* v. *Greene*, 523 U.S. 371 (1998); *Morris*, 187 F.3d at 340 (citing cases).

Section 2253(c) requires a "substantial showing of the denial of a constitutional right," and a prisoner makes that showing if he demonstrates that his conviction or sentence may have been imposed in violation of the Constitution and that the district court may have erred in refusing him relief.

There is no evidence that Congress intended to preclude appellate review when a prisoner has a meritorious underlying constitutional claim, but the district court has erroneously denied it on procedural grounds. Although that limitation would reduce appeals, it would do so at the expense of meritorious appeals. The goal of the certificate requirement, however, is to screen out "frivolous" appeals. See *Barefoot*, 463 U.S. at 892 & n.3; see also, *e.g.*, 141 Cong. Rec. S4596 (daily ed. Mar. 24, 1995) (Sen. Hatch) ("Habeas corpus reform must not discourage legitimate petitions that are clearly meritorious and deserve close scrutiny."). Further, although a prohibition on issuance of a COA when relief is denied on procedural grounds would not preclude all appellate review of procedural rulings (because the government can appeal without obtaining a certificate, Fed. R. App. P. 22(b)(3)), it would increase the likelihood of divergent procedural rules among the district courts. There is no warrant for attributing to Congress an intention to foster disarray in the procedural rules governing habeas cases, given the interest in consistent disposition of those cases.

The COA standard that we espouse would mean that, in some cases, a court of appeals, in deciding whether to issue a certificate, will have to pass on questions that

the district court has not addressed. For several reasons, however, that consideration does not warrant rejection of our proposed standard. First, an application to the court of appeals for a COA is not an appeal from the district court's denial of a COA but an independent proceeding in the court of appeals. Viewed in that light, it is not anomalous for the court of appeals to address issues in the first instance.

Second, courts of appeals not infrequently must address issues that district courts have not discussed in written opinions. In fact, district courts sometimes summarily dismiss entire habeas petitions without written opinions. See 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 15.2a, at 630 (3d ed. 1998) (noting that "some" courts of appeals require written opinions explaining summary dismissals). And, even though Federal Rule of Appellate Procedure 22(b) requires a district court that denies an application for a COA to "state why a certificate should not issue," the explanation may be brief and thus provide little guidance to a court of appeals. See, *e.g.*, J.A. 182-183.

Third, only in limited instances will a court of appeals, in passing on an application for a COA, in fact have to address the underlying claim raised in a petition for collateral relief without any prior discussion of the claim by the district court. The appellate court need do so only if (1) the district court has rejected the petition for collateral relief solely on procedural grounds; (2) the district court has denied a COA solely on procedural grounds, because it has concluded that the applicant's ability to overcome the procedural obstacle is not even debatable; but (3) the court of appeals disagrees with that conclusion, and therefore

cannot itself dispose of the application for a COA on procedural grounds.

CONCLUSION

The Court should hold that petitioner is subject to the COA requirements of amended 28 U.S.C. 2253(c) and therefore may not appeal from the district court's dismissal of his habeas petition unless he obtains a COA. The Court should also hold that petitioner is not entitled to a COA unless reasonable jurists could conclude both that his habeas petition is not barred by abuse of the writ and that it presents a constitutional claim on which petitioner could prevail. The Court may wish to remand this case to the court of appeals for application of that standard. Alternatively, the Court may wish to address the question on which it initially granted review in the course of deciding whether reasonable jurists could reject the district court's finding of abuse of the writ, and then dispose of the case accordingly.

Respectfully submitted.

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DECEMBER 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 98-15943

ANTONIO TONTON SLACK, PETITIONER-APPELLANT

v.

E. K. MCDANIEL, ATTORNEY GENERAL OF
THE STATE OF NEVADA, RESPONDENT-APPELLEE*

DOCKET ENTRIES

DATE	DOCKET NUMBERS	PROCEEDINGS
5/22/98	1	Filed request for a certificate of appealability. Date COA denied in DC: 5/19/98. DC file included (y/n): yes (MOATT).
5/22/98	2	Rec'd original DC file in 2 vol pldgs to (MOATT). (jr.)

* So in original.

DATE	DOCKET NUMBERS	PROCEEDINGS
5/22/98	3	Rec'd (coa pending) certificate of record. RT filed in DC none. [98-15943] (jr)
6/29/98	5	Case to motions panel. [98-15943] (rc) [Entry date 07/07/98]
7/7/98	6	Order filed, the request for a COA is DENIED. (Procedurally Terminated After Other Judicial Action; Certificate of Appealability. David R. THOMPSON; Edward LEAVY, author) [98-15943] (rc)
7/8/98	7	District court casefile returned. (ups) (stev)
10/13/98	8	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-6322 filed on 10/7/98. (Casefiles) [98-15943] (gva) [Entry date 10/15/98]

APPENDIX B

RELEVANT STATUTES AND RULES

1. Section 107(c) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1226, provides:

> Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

2. Section 2244 of Chapter 153 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

* * * * *

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> > (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
> >
> > (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
> >
> > (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
> >
> > (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

* * * * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

* * * * *

3. Section 2253(c) of Chapter 153 of Title 28, United States Code (Supp. III 1997), provides:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

4. Section 2254 of Chapter 153 of Title 28, United States Code (1994 & Supp. III 1997), provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * * * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review

by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * * * *

5. Section 2255 of Chapter 153 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

* * * * *

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the

Supreme Court, that was previously unavailable.

6. Section 2261 of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) [establishing procedures for appointment of counsel in State post-conviction proceedings] are satisfied.

* * * * *

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. * * *

7. Section 2262(c) of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

If one of the conditions in subsection (b) [specifying circumstances under which a stay of execution shall expire] has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the

filing of a second or successive application under section 2244(b).

8. Section 2264 of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides:

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsection (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

9. Section 2265 of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

(a) For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. * * *

* * * * *

(b) * * * No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. * * *

10. Section 2266 of Chapter 154 of Title 28, United States Code (Supp. III 1997), provides in relevant part:

* * * * *

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

* * * * *

(3) * * *

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

11. Rule 22(b) of the Federal Rules of Appellate Procedure provides:

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a State court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a State or its representative or the United States or its representative appeals.

12. Section 1914(a) of Title 28, United States Code (Supp. III 1997), provides:

The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $150, except that on application for a writ of habeas corpus the filing fee shall be $5.

13. Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides:

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

14. Rule 3 of the Federal Rules of Civil Procedure provides:

A civil action is commenced by filing a complaint with the court.

DEC 10 1999

(15)

No. 98-6322

Supreme Court, U.S.
FILED
DEC 10 1999
CLERK

IN THE

Supreme Court of the United States

ANTONIO TONTON SLACK,

Petitioner,

v.

E. K. McDANIEL, Warden, Ely (Nevada) State Prison, and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Do the provisions of AEDPA, specifically including 28 U.S.C. §2253(c) and 28 U.S.C. §2244(b) control the proceedings on appeal?

2. If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. §2253(c)?

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NO. 98-6322

In The
Supreme Court Of The United States

ANTONIO TONTON SLACK,
Petitioner,

v.

E. K. McDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

I. STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(b). provides:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under

section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court that applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. §2253(c) provides:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken in the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

II. STATEMENT OF THE CASE

On February 22, 1999, this Court granted certiorari on the following question: If a person's petition for habeas corpus

under 28 U.S.C. §2254 is dismissed for failure to exhaust his state remedies and he subsequently exhausts his state remedies and refiles the §2254 petition, are claims included within that petition that were not included within his initial §2254 filing "second and successive" habeas applications?

In the initial briefing the State of California filed an amici brief raising the issue of whether 28 U.S.C. §2253(c) as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 applied to Petitioner Antonio Slack's (hereinafter Slack) appeal. Oral argument, on the original question presented, was held on October 4, 1999.

On October 18, 1999, this Court ordered supplemental briefing on the two new questions regarding the applicability of the provisions of the AEDPA.

III. SUMMARY OF ARGUMENT

In *Hohn v. United* States, 524 U.S. 236 (1998), this Court implicitly acknowledged that the provisions of 28 U.S.C. §2253(c)(2) applied to a motion that was filed pre-AEDPA where the appeal was filed post-AEDPA. The *Hohn* case was in the same procedural posture as this case. While Slack's federal petition was filed pre-AEDPA, the only claims

at issue before this Court were first raised by Slack on December 24, 1997, one year and eight months after the effective date of the AEDPA. Joint Appendix (JA) 66-91.[1]

This Court determined in *Lindh v. Murphy,* 521 U.S. 320 (1997) that 28 U.S.C. §2254(d) did not apply to cases pending at the time the AEDPA was enacted. However, *Lindh* should not control this case because none of the claims at issue before this Court were pending when the AEDPA was enacted. Further, applying the AEDPA to Slack's claims is in keeping with this Court's case law recognizing Congress' decision to limit habeas corpus jurisdiction. *See Calderon v. Thompson*, 523 U.S. 538 (1998); *Felker v. Turpin,* 518 U.S. 651 (1996); *Lonchar v. Thomas,* 517 U.S. 314 (1996).

In addition, the legislative history of the AEDPA illustrates Congress' clear intent to enact meaningful, comprehensive habeas corpus reform in order to address the incessant collateral attacks on state court convictions. Failing to apply the provisions of the AEDPA to claims appearing for the first time months, if not years, after the act's effective date flies in the face of this congressional intent.

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1 All reference to the joint appendix is to the appendix filed with the initial briefs.

The applicability of the AEDPA should be based on the date the individual claims were first raised by the petitioner. If the claims were raised prior to the effective date pre-AEDPA law applies. If the claims were raised after the effective date the AEDPA applies. This method is in keeping with the intent of Congress as reflected in the legislative history of the AEDPA.

Applying different law to individual claims within a single petition is in keeping with current practice. Claims are already analyzed separately for purposes of exhaustion, procedural default and other affirmative defenses.

Finally, under 28 U.S.C. §2253(c)(2), as amended by the AEDPA, a certificate of appealability may only issue if the petitioner makes a substantial showing of the denial of a constitutional right. Slack is only appealing the dismissal of five of his claims as abusive. This purely procedural issue does not involve a constitutional right. Therefore, Slack is not entitled to a certificate of appealability.

IV. ARGUMENT

A. The provisions of the AEDPA, specifically including 28 U.S.C. §2244(b) and 28 U.S.C. §2253(c) should apply to Slack's claims.

On April 24, 1996, the AEDPA was signed into law creating substantial changes in chapter 153 of Title 28 of the United States Code governing habeas corpus proceedings in federal court. This Court has already determined that the new provisions of 28 U.S.C. 2254(d) do not apply retroactively to claims pending in federal court on the enactment date. *Lindh v. Murphy*, 521 U.S. 320 (1997). In *Lindh* this Court determined that because the newly enacted Chapter 154 was explicitly made applicable to cases pending on the enactment date Congress implicitly intended that the amendments to Chapter 153 only apply to cases that were filed after the enactment date.

However, subsequent to *Lindh* this Court decided *Hohn v. United States*, 524 U.S. 236 (1998). The *Hohn* case was in the same procedural posture as this case, a pre-AEDPA motion pursuant to 28 U.S.C. §2255 with a post-AEDPA appeal. Despite the fact that the *Hohn* case involved a pre-AEDPA petition the Eighth Circuit applied 28 U.S.C.

2253(c)(2) which required Hohn to obtain a certificate of appealability before his appeal would be heard.

The Eighth Circuit denied Hohn's application for a certificate of appealability and this Court granted certiorari to determine whether it had jurisdiction to review decisions denying applications for certificates of appealability. *Hohn* at 238-239. Nowhere in the *Hohn* decision did this Court indicate that it found the application of 28 U.S.C. §2253(c)(2) to Hohn's appeal problematic. This Court implicitly accepted the fact that the provisions of 28 U.S.C. §2253(c)(2) applied despite the fact that prior to the enactment of the AEDPA there was no requirement for a federal prisoner to obtain a certificate of appealability/probable cause before filing an appeal.

Also subsequent to this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997), the Eighth Circuit ruled that 28 U.S.C. §2253(c), as amended, applies to cases in which the appeal was filed post-AEDPA even though the petition was filed pre-AEDPA. *Tiedeman v. Benson*, 122 F.3d 518 (1997). The Eighth Circuit recently reaffirmed that ruling in a case decided subsequent to the first round of oral arguments in this

case. *Jackson v. Ganmon*, No. 99-1330, 1999 U.S. App. Lexis 27898 (8th Cir. October 28, 1999). *Contra, Conde v. Henry*, No. 98-56445, 1999 U.S. App. Lexis 31554 (9th Cir. December 3, 1999).

Further, the negative inference referred to in *Lindh* is not applicable to this case because all of Slack's claims at issue before this Court first appeared in his third amended petition filed in the federal district court on December 24, 1997, one year and eight months after the effective date of the AEDPA. JA 66-91. Therefore, Slack's claims were not pending when the AEDPA was passed and its provisions should govern these claims.

Respondents' position is in keeping with this Court's long recognition of the need to limit habeas corpus jurisdiction. Most recently this Court stated:

> In light of "the profound societal costs that attend the exercise of habeas jurisdiction," . . . we have found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief. . . .
>
> These limits reflect our enduring respect for "the State's interest in the finality of convictions that have survived direct review within the state court system." . . . Finality is essential to both the retributive and the deterrent

> functions of criminal law. "Neither innocence nor just punishment can be vindicated until the final judgment is known." . . .
>
> "Without finality, the criminal law is deprived of much of its deterrent effect." . . .
>
> Finality also enhances the quality of judging. There is perhaps "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." . . .

Calderon v. Thompson, 523 U.S. 538, 554-555 (1998) (internal citations omitted).

This Court has also recognized that judgments about the proper scope of the writ are normally for Congress to make. *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996). Such a judgment is exactly what Congress made when it enacted the AEDPA.

Limitations on the writ are necessary because, despite Congress' enactment of the AEDPA, convicted prisoners are still attempting to circumvent the new provisions. For example, some prisoners have attempted to circumvent the AEDPA by filing Federal Rule of Civil Procedure 60(b) motions instead of petitions for writs of habeas corpus. *See Fierro v. Johnson*, No. 98-50562, 1999 U.S. App. Lexis 30439

(5th Cir. November 23, 1999); *United States v. Rich*, 141 F.3d 550 (5th Cir. 1998).

The claims at issue in this case appeared for the first time ever one year and eight months after the effective date of the AEDPA. Slack should not be allowed to circumvent the AEDPA as to these claims.

Not applying the AEDPA to claims raised after the effective date but in a proceeding that technically began prior to the effective date would lead to absurd results such as in the case of *Calderon v. The United States District Court for the Central District of California (Kelly)*, 163 F.3d 530 (9th Cir. 1998). In *Kelly*, the petitioner filed a petition for the appointment of counsel in order to prepare a federal habeas petition in 1992 and 1993. *Id.* at 532-533. From 1992 through 1997 the petitioner did not file any petition. Apparently petitions were finally filed in 1998. The Ninth Circuit held that since the petitioner had requested counsel his case was pending on the effective date of the AEDPA. Therefore the Act did not apply to his petitions even though no claims for relief were asserted until approximately two years

after the effective date. Such a result flies in the face of Congress' intent, as discussed below, in enacting the AEDPA.

Respondents' position is supported by the legislative history of the AEDPA. On March 24, 1995, Senator Specter (Pennsylvania) introduced S. 623, a bill designed to reform the use of the federal writ of habeas corpus. 141 Cong. Rec. S4590-S4596. In introducing the bill Senator Specter explained that habeas corpus reform was necessary because the writ of habeas corpus has "been applied in a crazy-quilt manner with virtually endless appeals that deny justice to victims and defendants alike, making a mockery of the justice system." 141 Cong. Rec. S4591.

Senator Hatch (Utah), co-sponsor of the bill described it as follows:

> Habeas corpus reform must not discourage legitimate petitions that are clearly meritorious and deserve close scrutiny. Meaningful reform must, however, stop repeated assaults upon fair and valid State convictions through spurious petitions filed in Federal court.
>
> As a consequence, the reform proposal Senator Specter and I have introduced sets time limits to eliminate unnecessary delay and to discourage those who would use the system to prevent the imposition of a just sentence.

> Manufactured delays breed contempt for the law and have a profound effect on the victims of violent crime. . . . .After all, finality is a hallmark of a just system, and must be maintained in order to preserve the legitimacy of the criminal process.

141 Cong. Rec. S4596.

Senator Hatch subsequently called the habeas corpus reforms:

> the most important stage in criminal law in the last 30 years, and maybe in our lifetime. This is a change to stop the incessant frivolous appeals that are eating our country alive. We have the chance to really, really do something about this while at the same time protecting constitutional rights and civil liberties for everybody, and doing it in an appropriate, legally sound manner.

141 Cong. Rec. S7849.

Similar sentiments were expressed in the House of Representatives. Congressman Lucas (Oklahoma), in addressing the endless appeals process in capital cases, stated "I stand here today and say enough is enough. Support fundamental habeas corpus reform." 142 Cong. Rec. H2141.

In addition, the reforms enacted by the AEDPA were not a new development. The Senators and Congressmen involved had been attempting to pass meaningful habeas

corpus reform for approximately fifteen years. During the debates on the AEDPA Congressman Hyde (Illinois) stated:

> Now, habeas corpus reform, that is the Holy Grail. We have pursued that for 14 years, in my memory. The absurdity, the obscenity of 17 years from the time a person has been sentenced till that sentence is carried out through endless appeals, up and down the State court system, and up and down the Federal court system, makes a mockery of the law.

142 Cong. Rec. H3606.

What the foregoing legislative history makes clear is that Congress intended the AEDPA to effect meaningful, comprehensive reform of habeas corpus proceedings in federal court. While abuses in capital cases was of major concern the reforms were not limited to death penalty cases. As Senator Specter stated on June 7, 1995, it was "time to move ahead with legislation to reform habeas corpus in all cases." 141 Cong. Rec. S7803.

The main purpose of the AEDPA was to stop the endless rounds of litigation by state prisoners. Congress certainly would not have intended that the provisions of the act would not apply to claims appearing for the very first time one year and eight months after the effective date.

Respondents submit that applying the AEDPA to claims that appear for the first time after the effective date of the act is in keeping with congressional intent and would not be unduly burdensome on the courts or on the parties. Determining whether pre or post-AEDPA law applies to an individual claim would be a simple matter of looking at the date the claim first appeared in the case. This is a bright line rule that would not lead to confusion or additional litigation.

In addition, claims within a petition are treated independently as a matter of course. Some claims may be unexhausted in which case the petitioner may abandon them and proceed with his exhausted claims. *Rose v. Lundy*, 455 U.S. 509, 520-521 (1982). Some claims may have been procedurally defaulted in state court in which case they will have to be analyzed separately to determine if the petitioner is able to demonstrate cause and prejudice to overcome the default. *See Coleman v. Thompson*, 501 U.S. 722 (1991). If a petitioner is able to meet this standard for some of his claims but not others he may proceed only with those claims for which he has demonstrated cause and prejudice.

In this case, the five claims at issue before this Court were dismissed as abusive under Rule 9(b) by the federal district court. JA 152-160. In addition, one of Slack's claims was dismissed as unexhausted. *Id.*[2] The court looked at each individual claim and, applying different law to the claims requiring it, reached the correct result.

The same distinction is made by appellate courts. Denial of a habeas corpus petition is reviewed de novo. *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995). However, factual findings relevant to the district court's determination are reviewed for clear error. *Moran v. McDaniel*, 80 F.3d 1261 (9th Cir. 1996). A district court's decision not to review the merits of a claim because it is abusive or successive is reviewed for an abuse of discretion. *Campbell v. Blodgett*, 997 F.2d 512 (9th Cir. 1992). In addition, a presumption of correctness is accorded to factual findings made by the state court. *Melugin v. Hames*, 38 F.3d 1478 (9th Cir. 1994). Therefore, courts are applying different standards of review to different aspects of the same claim as well as to individual claims within the same petition.

---

2 Because the five claims were dismissed as abusive the district court did not reach Respondents' argument that they were also unexhausted. JA 157.

The point is that courts apply different law and different standards to individual claims within a single petition all of the time. Applying pre and post-AEDPA law to claims within the same petition would not be a significant departure from current practice.

Respondents were unable to find any case in which a court applied pre and post-AEDPA law in the manner proposed. However, at least one federal court has taken a similar course of action in the sexual harassment arena. In *Mills v. Amoco*, 872 F.Supp. 975 (S.D.GA 1994), the plaintiff brought a sexual harassment complaint alleging conduct that occurred both before and after the effective date of the Civil Rights Act of 1991. This Court has held that the remedial provisions of Title VII of the 1991 Act do not apply to pre-enactment conduct. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The federal district court in *Mills* held that the plaintiff could recover punitive and compensatory damages under the 1991 Act for the conduct that occurred after the effective date but could not recover such damages for conduct that occurred before the effective date. Since determining

which law applied was based solely on the date of the conduct the distinction was easy to make.

Likewise, in habeas corpus cases the determination of when to apply the AEDPA would be easy to make. If a claim is raised for the first time after April 24, 1996, the provisions of the AEDPA would apply. If a claim is raised in a pleading before April 24, 1996, pre-AEDPA law would apply. This practice would not be unduly burdensome and is in keeping with the congressional intent reflected in the AEDPA's legislative history.

Finally, this Court's decision in the *Lindh* case is distinguishable in that *Lindh* involved the application of 28 U.S.C. §2254(d) to cases pending on the AEDPA's effective date. Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(d) deals with the determination of an individual claim on its merits and dictates a strong deference to decisions of state courts. This provision significantly narrows the merits review of the federal district courts for claims that were decided on their merits in state court and thus has a substantive effect on petitions.

In contrast 28 U.S.C. §2244(b) is purely procedural in that it dictates the procedures which must be followed before a state prisoner is allowed a second round of federal habeas review. In addition, 28 U.S.C. §2253(c) only governs the procedures for appeals from the denial of habeas corpus petitions. Changes in procedural rules may be applied to cases arising prior to their enactment. *Landgraf v. USI Film Products*, 511 U.S. 244, 275 (1994).

Section 2253(c) should certainly apply to Slack's case. As the Eighth Circuit has stated "we can think of no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of

a case in a trial court, instead of on the filing of a notice of appeal or similar document." *Tiedman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997).

Respondents submit that the applicable date for determining the applicability of section 2244(b) should be the date the claims at issue are filed in the district court. In addition, the relevant date for determining if section 2253(c) applies should be the date the appeal is filed. Otherwise situations would arise, such as this case, in which claims appearing for the first time months, if not years, after the effective date of the AEDPA would still be governed under the old law. Such a result is contrary to the clear intent of Congress to enact meaningful reforms that address the incessant delays in federal habeas corpus.

B. Slack is not entitled to a certificate of appealability under 28 U.S.C. §2253(c).[3]

Prior to the effective date of the AEDPA a state prisoner was required to obtain a certificate of probable cause in order to appeal the denial of his federal habeas petition. *Former* 28 U.S.C. §2253(c)(1)(A). Under the old system a

3 This question is covered extensively in the Amici States' brief. In the interest of judicial economy Respondents' argument will be brief in order to avoid duplication of effort.

certificate of probable cause would not issue unless the petitioner made a substantial showing of the denial of a federal right. *Barefoot v. Estelle*, 463 U.S. 880 (1983). In order to make such a showing a petitioner was required to demonstrate that "the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner] or that the questions are 'adequate to deserve encouragement to proceed further.'" *Id.* at 893, n. 4 (internal citations omitted).

In contrast, 28 U.S.C. §2253(c)(2), as amended by the AEDPA, provides that a certificate of appealability may only issue if the applicant has made a substantial showing of the denial of a constitutional right. The Ninth Circuit has indicated that the new standard under AEDPA is more demanding than the standard for obtaining a certificate for probable cause under the old law. *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). In addition, the Fourth Circuit has held that a petitioner's claims that his rights were violated under the Vienna Convention does not satisfy the new standard under sections 2253(c)(2) because the Vienna Convention does not create any constitutional rights. *Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997).

Congress is presumed to know the law that is in effect at the time it enacts a new statute. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n. 66 (1982). If Congress had intended to simply codify the *Barefoot* standard it would not have changed the applicable language from a federal right to a constitutional right. It is generally presumed that Congress acts intentionally and purposefully. *See Hohn v. United States*, 524 U.S. 236, 250 (1998); *United States v. Valdez*, No. 98-35526, 1999 U.S. App. Lexis 29686 *7, (9th Cir. November 12, 1999). Respondents submit that by changing the standard to require a denial of a constitutional right Congress intended to make the standard to obtain an appeal more demanding. Therefore, procedural issues that could previously be appealed are no longer permitted because, while they may involve federal rights, they in no way implicate the constitution.

In this case, Slack is appealing the dismissal of five of his claims for relief as abusive. This is a procedural issue that does not involve constitutional rights. *See Felker v. Turpin*, 518 U.S. 651 (1996). Since Slack is not raising a constitutional issue he is unable to meet the standard of a

"substantial showing of the denial of a constitutional right" under 28 U.S.C. §2253(c)(2). Therefore, Slack is not entitled to a certificate of appealability.

V. CONCLUSION

The provisions of 28 U.S.C. §2244(b) and 28 U.S.C. §2253(c) should be applied to Slack's petition. Since Slack is unable to make the required showing to obtain a certificate of appealability pursuant to 28 U.S.C. §2253 his appeal should be dismissed.

Dated: December, 1999.

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No. 98-6322

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO T. SLACK, *Petitioner*,

v.

E.K. McDANIEL, Warden, Ely Nevada State Prison, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WASHINGTON IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Do the provisions of AEDPA, specifically including 28 U.S.C. §2253(c) and 28 U.S.C. §2244(b), control the proceedings on appeal?

2. If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. §2253(c)?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 98-6322

ANTONIO T. SLACK, *Petitioner*,

v.

E.K. McDANIEL, Warden, Ely Nevada State Prison, et al.,
Respondents.

INTEREST OF AMICI CURIAE

All decisions by this Court concerning habeas corpus applications filed pursuant to Section 2254[1] of Title 28 of the United States Code are of interest to amici, as amici are responsible for defending presumptively valid state court criminal convictions against federal habeas corpus challenges. The issues of whether the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), specifically Sections 2244(b) and 2253(c), apply to any claims asserted after April 24, 1996, via amendment to an existing petition, or in a new petition, and whether Section 2253(c) nevertheless applies to any appeal that was commenced after the enactment date of

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1. All further references to "sections" are to sections of Title 28 of the United States Code, unless otherwise specified.

the AEDPA, are therefore of significant concern to amici. Likewise, whether Congress, in amending Section 2253, intended to preclude appeals like the instant one because it does not involve any "constitutional" issues is also of substantial interest to amici.[2]

SUMMARY OF ARGUMENT

The provisions of chapter 153 of the Judicial Code, as amended by the AEDPA, specifically including Sections 2244(b) and 2253(c), apply to this case. Slack seeks appellate review of the district court's dismissal of five claims on second or successive petition/abuse of the writ grounds. Those five claims were not added to Slack's Section 2254 petition until *after* April 24, 1996, the day the AEDPA was enacted. That takes this case outside the confines of this Court's holding in *Lindh v. Murphy*, 521 U.S. 320 (1977), "that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.*, at 336. *Lindh* did not define what constituted a "case filed" for purposes of its decision. Defining such a "case" in terms of when the subject *claims* for relief were actually asserted, rather than in terms of other events, best reflects Congress's intent in enacting the AEDPA. Moreover, Section 2253(c) applies to any appeal initiated after the enactment date of the AEDPA, regardless of when the original application for relief was filed in district court.

---

2. This brief is submitted in support of respondents by amici through their respective Attorneys General in accordance with Rules 37.2 and 37.5 of the Rules of the Supreme Court of the United States. Because amici discussed the first question extensively in their prior brief, filed in June 1999, and because amici understand that question will be further thoroughly addressed in other briefs, amici focus primarily on the second question here. *See* Rule 37.1 of the Rules of the Supreme Court of the United States.

Because the AEDPA applies in this case, Slack must show the substantial violation of a *constitutional* right to justify the issuance of a certificate of appealability ("COA"), which is a jurisdictional prerequisite to a habeas corpus appeal. In this regard, because any appeal necessarily involves a higher court reviewing the *decision* of a lower, it is the district court decision that must be the focus for purposes of whether a COA should issue. In other words, the district court's denial of relief must be based on constitutional grounds before a COA could properly be issued. Because the denial of relief on second or successive petition/abuse of the writ grounds in this case was not based on the Constitution, Slack can not meet the COA standard. This appeal should be dismissed.

ARGUMENT

I.

28 U.S.C. Sections 2244 And 2253, As Amended By The AEDPA, Apply To Any Claim Asserted After April 24, 1996, Whether By Filing A New Petition, Or By Amending An Already Existing Petition; And Section 2253(c) Nevertheless Applies To Any Appeal Where The Request To Appeal, Or Notice Of Appeal, Was Filed After The Enactment Date Of The AEDPA.

In *Lindh*, this Court held "that the new provisions of chapter 153 generally apply only to *cases filed* after the Act became effective." 521 U.S. at 336 (emphasis added). However, *Lindh* neither confronted nor answered the question of whether the new provisions would apply to claims amended into an already existing

petition after the statute's enactment. As discussed in detail in the States' Amicus Brief dated June 21, 1999, at 4-13, the "case" should be viewed in terms of when the actual claims for relief were asserted. Amici here briefly summarize that argument.

The *Lindh* majority's holding, that Congress intended the provisions of chapter 153 to apply only to cases filed after April 24, 1996, dealt only with claims for relief asserted prior to that date. As to claims asserted *after* the enactment date of the AEDPA, via amendment or otherwise, both Congress and *Lindh* are silent as to whether the AEDPA applies. As a result, amici submit, general retroactivity principles resolve the issue. Because the assertion of a claim for relief is the pertinent retroactivity event, applying the AEDPA to claims asserted after April 24, 1996, constitutes a proper, prospective application of the law. *See Landgraf v. USI Film Products*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring). The AEDPA's amendments in chapter 153, including those in Section 2244 and 2253, apply to each of Slack's five dismissed claims, as they were all asserted after April 24, 1996.

With respect to Section 2253(c) specifically, the COA requirement should therefore apply to any claim that is the subject of the intended appeal if that claim was raised after the enactment date of the AEDPA. In any event, Section 2253(c) should apply to any appeal initiated after April 24, 1996, via the filing of an application for permission to appeal, or a notice of appeal itself. *Tiedman v. Benson*, 122 F.3d 518, 520-21 (8th Cir. 1997); *see also Hohn v. United States*, 118 S. Ct. 1969 (1998) (resolving a COA issue where appeal initiated after enactment date of AEDPA, but actual Section 2255 motion filed prior to that date). In either case, all five of Slack's claims that were dismissed by the district court on second or successive petition/abuse of the writ grounds were and are covered by all provisions of chapter 153 as

amended by the AEDPA, specifically including Sections 2244(b) and 2253(c).

II.

Because Slack's Intended Appeal Does Not Involve A Constitutional Issue, Let Alone A "Substantial" One, As Required By Section 2253(c), He May Not Properly Be Issued A Certificate Of Appealability, And This Appeal Should Be Dismissed

Under the AEDPA, before a habeas applicant in a Section 2254 (or 2255) case can appeal a final district court order, a COA must be issued by a circuit judge or justice. 28 U.S.C. §2253(c)(1). The COA may issue "only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. §2253(c)(2) (emphasis added). In this regard, because any appeal necessarily involves a higher court reviewing the *decision* of a lower court, the denial of relief reflected in the lower court's decision must be grounded in the Constitution before a COA may properly be issued. Under the pre-AEDPA certificate of probable cause standard, it was never necessary for an issuing court to look beyond the four corners of the district court order that was the subject of the intended appeal in order to determine whether there had been a violation of a "federal right," within the meaning of *Barefoot v. Estelle*, 463 U.S. 880 (1993). There is nothing in the AEDPA that indicates Congress intended the federal courts to start looking in other places to determine whether the COA standard has been met.

This AEDPA standard constitutes a significant departure from the pre-AEDPA requirement that a Section 2254 applicant make only a substantial showing of the violation of a "federal right" in order to obtain

permission to appeal.[3] *Barefoot*, 463 U.S. at 893. Under the old *Barefoot* standard, district court decisions denying habeas relief on non-constitutional grounds, like second or successive petition/abuse of the writ, were potentially reviewable because such rulings were grounded in federal rules and statutory law. *See* 28 U.S.C. §2244(b); Rules Governing Section 2254 Cases In United States District Courts, Rule 9(b), 28 U.S.C. foll. § 2254. The new AEDPA standard, requiring a showing of a constitutional violation, changes that. Whether a habeas corpus application is second or successive is *not* a constitutional question. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (application of abuse of the writ doctrine as delineated by case law and later tightened by statute does not infringe on the Constitution); *see also McCleskey v. Zant*, 499 U.S. 467, 479-89 (1991) (doctrines of second or successive petition and "abuse of the writ refer[] to [] complex and evolving bod[ies] of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," but not by constitutional mandate). Such non-constitutional questions are therefore unreviewable on appeal under the AEDPA.

In amending Section 2253, Congress chose specific language that precluded habeas appeals not involving substantial constitutional issues. As discussed in the States' original Amicus Brief, the plain language of Section 2253, as amended by the AEDPA, the legislative history, and the traditional rules of statutory construction support that conclusion. Congress specifically changed "federal right" to "constitutional right" in amending Section 2253. Because "federal" and "constitutional" do not share identical meanings, Congress's intent to limit direct

3. Prior to the enactment of the AEDPA, Section 2255 applicants were not required to obtain any type of permission prior to appealing a district court ruling. *See* 28 U.S.C. §2253 (pre-AEDPA version).

appeals in Section 2254 cases to only those involving district court denials on constitutional grounds is apparent. *See* Brief of Amici Curiae States of California, et al., dated June 21, 1999, at 21-25. The United States Court of Appeals for the Fourth Circuit, in *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997), adopted this obvious interpretation in refusing to issue a COA to a state inmate seeking review of a district court order that had denied relief on non-constitutional grounds.

Some lower federal appellate courts, however, have erroneously held that, despite the undeniable language used in Section 2253(c), Congress did not intend to preclude direct appellate review of procedural issues that could dispose of an entire Section 2254 petition, or a claim or claims therein. For example, the United States Court of Appeals for the Fifth Circuit has manufactured a two-part test to determine whether a procedural denial, such as one based on the one-year limitations period in Section 2244(d), is subject to review under the Section 2253(c) COA standard. According to that court, a COA may issue if a habeas applicant makes (1) a credible showing that the district court's procedural ruling was incorrect, and (2) a substantial showing that the underlying habeas petition alleges a deprivation of constitutional rights. *Sonnier v. Johnson*, 161 F.3d 941, 943-44 (5th Cir. 1998); *accord Morris v. Horn*, 187 F.3d 333, 340-41 (3rd Cir. 1999) (relying on the Fifth Circuit test). These courts have improperly evaded congressional intent by adding language and requirements to Section 2253(c) that do not exist. Other courts, too, have incorrectly allowed appellate review of non-constitutional issues without engaging in any analysis of Section 2253(c) whatsoever. *E.g.*, *Gaskins v. Duval*, 183 F.3d 8, 9 n.1 (1st Cir. 1999); *Thomas v. Greiner*, 174 F.3d 260 (8th Cir. 1999); *Nichols v. Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999).

Slack might rely on the foregoing cases to argue that the focus, for purposes of determining whether a COA should issue, is on the underlying claims in the Section 2254 application itself, as opposed to the district court's decision. *See, e.g.*, Slack's August 1999 Reply at 16-17. Under this view, Slack would be entitled to a COA because his underlying claims in the Section 2254 application itself assert violations of the Constitution. *Id.* For the reasons that follow, the holdings in the cases discussed above, and any argument by Slack relying on them, must be rejected.

First, as touched on previously, it is beyond debate that any appeal, in the habeas corpus context or otherwise, involves a higher court reviewing the *decision* of a lower court. Section 2253(a) makes quite clear that:

> In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, *the final order shall be subject to review*, on appeal, by the court of appeals for the circuit in which the proceeding is held.

28 U.S.C. §2253(a) (emphasis added). Because it is a "final order" being reviewed, it is the final order that must be the focus for purposes of determining whether a COA should issue. Here, Slack challenges the district court's final order denying five claims on second or successive petition/abuse of the writ grounds. Because that order raises no constitutional questions, the order may not be reviewed under Section 2253(c).

The foregoing interpretation is further supported by the fact that, under the old *Barefoot* "federal right" standard, it was *never* necessary to look beyond the district court order denying habeas relief to determine whether a certificate of probable cause ("CPC") should issue. Virtually every ruling handed down by a district court denying habeas corpus relief would have been based on

the Constitution, or some procedural rule that was either judicially created or statutory in nature, and therefore a "federal right." Thus, reviewing courts never had occasion to look to the claims in the habeas application itself when deciding whether to issue a CPC. *See, e.g., Parkhurst v. Shillinger*, 128 F.3d 1366 (10th Cir. 1997) (CPC granted to determine correctness of district court's order dismissing petition for failure to exhaust); *Phillips v. Vasquez*, 56 F.3d 1030 (9th Cir 1994) (same); *Hall v. DiPaolo*, 986 F.2d 7 (1st Cir. 1993) (same); *Duttry v. SCIP Superintendent Petsock, et al.*, 878 F.2d 123 (3rd Cir. 1989) (same); *Mathis v. Hood*, 851 F.2d 612 (2d Cir. 1988) (same).

That being the case, there is no reason to believe that Congress, in enacting the AEDPA, suddenly wanted circuit judges or justices to look beyond the four corners of a district court order/judgment when determining whether to issue a COA. Nothing in the AEDPA, or anywhere else, instructs the federal courts to look, for the first time ever, somewhere other than to the district court order when deciding whether a COA should issue. Had Congress intended the issuing courts to engage in this unprecedented practice, one would expect that Congress would have said something in that regard. *See Finley v. United States*, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'") (citation omitted). This Court should not disregard the express rule set forth by Congress in Section 2253(c) so as to allow improper review of district court decisions not based on constitutional grounds.

Certainly, by changing "federal right" to "constitutional right," with respect to the showing required to warrant the issuance of a COA, Congress clearly intended to preclude appellate review of certain issues. Slack may argue that any change relates only to Section 2254 cases where relief

was sought for something other than a constitutional violation. *See* 28 U.S.C. §2254(a) (someone in custody pursuant to a state court judgment may seek habeas relief by showing the custody is unlawful under "the Constitution or laws or treaties of the United States"). This exclusive interpretation, however, appears highly unlikely.

As far as amici can tell, this Court has *never* granted relief in a Section 2254 case for anything other than a violation of the Constitution. In other words, despite the fact that Section 2254(a) permits the granting of habeas corpus relief for a state prisoner in custody "in violation of the Constitution or laws or treaties of the United States," it does not appear that a treaty or federal law, rather than the Constitution, has *ever* provided the basis for this Court to grant habeas corpus relief in a Section 2254 case.[4] Thus, amici respectfully submit that it would make no sense to conclude that Congress elevated the *Barefoot* "federal right" standard to the current "constitutional right" standard simply to preclude habeas appeals involving claims based on treaties or non-constitutional federal laws, when such cases rarely had occurred, rarely had been successful, and had *never* been successful in this Court.

To the contrary, Congress was attempting to limit substantially the issues to be litigated on appeal in Section 2254 cases by reducing such appeals to those requiring

4. On rare occasions, Section 2254 applicants have attempted to obtain relief based on an alleged violation of a treaty, *see, e.g.*, *Breard v. Greene*, 523 U.S. 371 (1998), or the Interstate Agreement on Detainers (IAD), which is a non-constitutional federal law applicable to the states that are parties to the agreement. *Reed v. Farley*, 512 U.S. 339 (1994). While some lower federal appellate courts have granted Section 2254 relief based on a violation of the IAD, amici's research shows the number of published cases in that regard to be less than ten. *See, e.g.*, *Gibson v. Klevenhagen*, 777 F.2d 1056 (5th Cir. 1985); *Nash v. Jeffes*, 739 F.2d 878 (3rd Cir. 1984); *Cavallaro v. Wyrick*, 701 F.2d 1273 (8th Cir. 1983); *Cody v. Morris*, 623 F.2d 101 (9th Cir. 1980); *Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978).

resolution of constitutional questions, and excluding appellate review of habeas denials based on procedural grounds, such as the new AEDPA statute of limitations or provisions against second or successive petition.[5] Such limitations are entirely consistent with, and representative of, the overall express congressional intent behind the enactment of the AEDPA in the first place. For example, the one-year limitations period of Section 2244(d) is a clear reflection of "Congress's desire to accelerate the federal habeas process." *Calderon v. United States District Court for the Central District (Beeler)*, 112 F.3d 386, 391 (9th Cir. 1997), overruled on another point in *Calderon v. United States District Court for the Central District of California (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). Likewise, the AEDPA's more restrictive second or successive petition provisions of Section 2244(b), and severe limitations on the availability of evidentiary hearings, as reflected in Section 2254(e), reinforce the fact that the AEDPA was enacted to speed up the federal habeas process, cut back on repeated proceedings, including appeals, and that "Congress intended to restrict the availability of habeas corpus relief when it passed the Act. . . ." *Greenawalt v. Stewart*, 105 F.3d 1268, 1275 (9th Cir. 1997).

Though not necessarily specific to Section 2253(c), the congressional floor debates concerning the AEDPA constitute a further example of Congress's intent to substantially limit the availability of federal habeas corpus relief, and to expedite habeas corpus proceedings. For example, Senator Arlen Specter explained that reform was sorely needed because "[t]he great writ of habeas corpus"

5. Due to the specific language in Section 2253(c), habeas appeals involving an alleged violation of a treaty or non-constitutional federal law are now precluded, even though such cases were clearly not Congress's inspiration for elevating the showing necessary to warrant the issuance of a COA. *See, e.g.*, *Murphy*, 116 F.3d 97.

was being "applied in a crazy-quilt manner with *virtually endless appeals* that deny justice to victims and defendants alike, making a mockery of the judicial system." 141 Cong. Rec. S4591 (emphasis added). Senator Orrin Hatch, co-sponsor of the habeas corpus reform bill, likewise emphasized the need to "stop *repeated assaults* upon fair and valid State convictions through spurious petitions filed in Federal court" and described the bill as the instrument by which to protect "constitutional guarantees of freedom from illegal punishment, while at the same time ensuring that lawfully convicted criminals will not be able to twist the criminal justice system to their own advantage." 141 Cong. Rec. S4596 (emphasis added).

Additionally, Representative Henry Hyde, like Senators Specter and Hatch, explained that such reform was necessary to preempt the "abuse of habeas corpus" by convicted capital murderers whose sole aim is to "stretch it out." 142 Cong. Rec. H2182, H2184, H2249 (daily eds. March 13-14, 1996). Representative Bill McCollum, a co-proponent of the bill, expressed a similar sentiment, explaining that, by allowing death row inmates into federal court "one time and one time only," the bill would end "the seemingly endless appeals" and "15- and 20-year delays of carrying out . . . the death penalty." 142 Cong. Rec. H2143 (daily ed. March 13, 1996).

Clearly, habeas corpus reform in the death penalty context was a major concern, due to the incredible length of time it was taking for capital cases to run their course through the federal habeas process. But the purpose of habeas corpus reform was not limited to the death penalty arena. As Senator Specter stated, it was "time to move ahead with legislation to reform habeas corpus *in all cases*." 141 Cong. Rec. S7803 (daily ed. June 7, 1995) (emphasis added). The provisions of chapter 153, as amended by the AEDPA, apply to *all* habeas corpus cases, and those provisions, including Section 2253(c), illustrate Congress's intent to expedite the habeas corpus

process in capital and non-capital cases alike by eliminating appeals that did not directly implicate the Constitution.

Against that backdrop, it is clear that there is nothing draconian about reducing Section 2254 and 2255 appeals to only those cases presenting constitutional questions. It must be remembered that in a Section 2254 case, particularly a non-capital case like this one, there have already been multiple layers of judicial review prior to the contemplation of a federal appeal. Here, Slack had a state trial, and then a state appeal which was denied on the merits by the Nevada Supreme Court.[6] He then pursued post-conviction review in the Nevada trial court and, when that was denied, he returned to the Nevada Supreme Court where his claims were reviewed and relief was denied again. Thereafter, he pursued relief in the federal district court, where five of his claims were dismissed on second or successive petition/abuse of the writ grounds. It is not as if precluding yet another layer of judicial review is somehow unfair or would compromise the accuracy of the previous determinations made by state and federal courts that Slack is not entitled to any relief. It was not harsh for Congress to decide that, because habeas applicants like Slack already have had ample judicial review, they may pursue direct appeals in habeas corpus cases only on constitutional questions. Absent a constitutional question, the compelling interest in finality of state court convictions outweighs any interest in further review by direct appeal.

To be sure, amici have not asserted here that a procedural ruling, such as the second or successive petition ruling in this case, can never be subject to any

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6. After his appeal was denied by the Nevada Supreme Court, Slack filed his first federal habeas corpus petition. However, that petition was dismissed without prejudice so Slack could return to state court and exhaust additional claims.

review. All amici have argued is that, pursuant to the express language of Section 2253(c), ordinary direct appeal is unavailable for non-constitutional questions. In an extraordinary case, a Section 2254 applicant might still seek review of a district court's procedural ruling in the context of a petition for a writ of mandate/prohibition, pursuant to 28 U.S.C. §1651, if the applicable standard could be met. Hence, for truly egregious procedural rulings, relief might be available. For example, if a district court denied a petition on statute of limitations grounds, and it was indisputable that the petition was in fact timely, a petitioner well might be able to satisfy the standard necessary to warrant the granting of mandamus relief.[7/] *See Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943) (writ relief available where no other adequate means to attain relief); *Banker's Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (to obtain relief pursuant to Section 1651, must show right to relief is clear and indisputable).

---

7. Federal review ultimately might prove unavailable, however, for a type of claim often dismissed in the district court on non-constitutional grounds. Denials without prejudice for failure to exhaust do not really act as a bar to habeas corpus relief; they simply delay a petitioner's ability to seek federal relief. So long as the petitioner returns to state court and properly exhausts all available remedies, and then returns to federal court in a timely manner, habeas review on the merits, and appeal from an adverse ruling on the merits of the constitutional claims, will still ordinarily be available. Thus, a habeas petitioner would be hard pressed to argue that the preclusion of any type of judicial review for an exhaustion issue constitutes a deprivation of anything meaningful.

CONCLUSION

Accordingly, amici respectfully request that this Court find the provisions of chapter 153 of the AEDPA, including Section 2253(c), applicable to this case. Amici also ask that this Court find Slack unable to meet the COA standard of showing the substantial violation of a constitutional right, and therefore order the appeal dismissed.

Dated: December 9, 1999.

Respectfully submitted,

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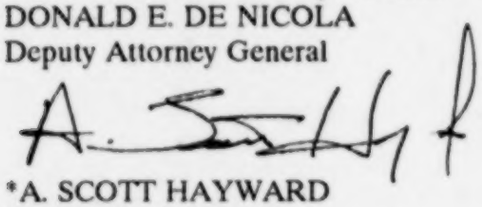

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No. 98-6322

IN THE

Supreme Court of the United States

ANTONIO SLACK,

Petitioner,

vs.

E. K. MCDANIEL, Warden, Ely (Nevada) State Prison, and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

(1) Do the provisions of AEDPA, specifically including 28 U. S. C. § 2253(c) and 28 U. S. C. § 2244(b), control the proceedings on appeal?

(2) If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U. S. C. § 2253(c)?

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Interest of Amicus Curiae. The Criminal Justice Legal Foundation (CJLF)[1] was formed to promote the interests of victims of crime and the law-abiding public in the criminal justice system. Allowing appeals on procedural points by petitioners with no substantial claims on the merits would further delay justice and consume resources needed for more worthy cases, contrary to the interests CJLF was formed to protect.

Summary of Argument. *Hohn* v. *United States* has already held that amended § 2253 applies to cases filed before AEDPA but appealed afterward, by applying the statute to Hohn's case despite his *Lindh* v. *Murphy* argument. The only basis for this conclusion in a *federal* prisoner case was a rejection of sweeping language in *Lindh* purporting to apply its holding beyond § 2254(d) to all of AEDPA's chapter 153 amendments.

Lindh was wrongly decided as an original matter. In addition, it is inconsistent with the later case of *Martin* v. *Hadix*, which rejected a very similar argument. To clear up the confusion, "negative implication" of pure prospectivity of one provision from an express statement of retroactivity for another should be categorically rejected.

The amended statute allows appeals by those petitioners who have substantial constitutional claims on the merits. An appeal, once allowed, permits review of the procedural prerequisites of the arguably meritorious claims.

ARGUMENT

I. *Hohn* implicitly held that amended § 2253 applies; the only question is why.

The first question is whether the amendment to 28 U. S. C. § 2253 in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), reprinted in Appendix A, applies to a case filed in district court before the effective date of the act but appealed

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1. No counsel for a party authored this brief in whole or in part, and no one other than CJLF made any contribution to its preparation or submission. Both parties have consented in writing to its filing.

after. The principal, perhaps only, argument that it does not is the statement in *Lindh* v. *Murphy*, 521 U. S. 320, 327 (1997) that the amendments to chapter 153 of title 28 apply only to a case filed after the effective date of AEDPA.

Precisely that argument has already been made to this Court and been rejected. Before AEDPA, Arnold Hohn, a federal prisoner, filed a motion under 28 U. S. C. § 2255 to vacate his conviction. *Hohn* v. *United States*, 524 U. S. 236, 239 (1998). He filed his notice of appeal three months after the effective date, and the court of appeals treated his notice as an application for a certificate of appealability. *Ibid.* Before AEDPA, § 2253 did not apply to federal prisoners.

Hohn argued that, under *Lindh*, the amendment did not apply to his case. Brief for Petitioner in *Hohn* v. *United States*, No. 96-8986, pp. 41-42. The Court's opinion in *Hohn* does not mention this argument, but proceeds to decide that this Court has statutory certiorari jurisdiction to review denial of the certificate by the court of appeals. *Hohn*, 524 U. S., at 253.

It is well established that "[q]uestions which merely lurk in the record, *neither brought to the attention of the court* nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511 (1925) (emphasis added). When the point has been briefed, however, the rule is different. *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990), held that when a point is argued either by a party or by the dissenting opinion and not addressed by the Court, the refusal to address the argument is an implicit rejection of it. See also *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529, 539, n. 2 (1991) (opinion of Souter, J.).

The Court may decline to reach some arguments for reasons other than the merits. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U. S. 519, 535 (1992) (not fairly included in question presented in certiorari petition); *Califano* v. *Yamaski*, 442 U. S. 682, 693 (1979) (constitutional argument need not be addressed when party asserting it prevails on other grounds). No such reason appears for ignoring Hohn's *Lindh* argument. The conclusion that § 2253 applied to Hohn's case was an essential prerequisite

to the question of whether a certificate application is a "[c]ase[] in the court[] of appeals" within the meaning of 28 U. S. C. § 1254. Cf. *Caspari* v. *Bohlen*, 510 U. S. 383, 389-390 (1994) (necessary predicate question is fairly included). If § 2253 did not apply, then Hohn's original notice of appeal, see 524 U. S., at 240, would have been valid. If so, then he indisputably would have had a case in the court of appeals. The difficult question of whether to overrule *House* v. *Mayo*, 324 U. S. 42, 44 (1945) (*per curiam*) would not have been presented, and it would have been improper to decide it. We should not assume that this Court would reach out to overrule a precedent in a case where it was totally unnecessary. Under the rule of *Clemons*, *supra*, the *Hohn* Court's refusal to address petitioner's *Lindh* argument was a rejection of it.

There are two possible bases for *Hohn*'s rejection of this argument. One possibility is the expansion of the concept of the certificate application as a "case." Under this approach, the application is a new case, separate from the original case and filed after the effective date. Hence, the new statute would apply.

As applied to a state prisoner such as Slack, this would not be too much of a stretch beyond *Hohn*. Under either AEDPA or pre-AEDPA law, Slack had to file an application, creating a "case." For Hohn, though, this theory would depend on circular logic. Under pre-AEDPA law Hohn had an appeal as of right. His notice of appeal was treated as an application for a certificate only on the assumption that § 2253 applied. See 524 U. S., at 240. Without that assumption, *Hohn*'s holding that an application for a certificate is a "case" would have to be stretched to hold that a notice of appeal is also a "case." A notice of appeal, however, does not typically present issues for briefing and decision, cf. *id.*, at 245, and that would be stretching *Hohn* too far.

There is an alternative basis for rejection of the *Lindh* argument. Notwithstanding some expansive language, the actual question presented in *Lindh* was limited to the temporal scope of a single, new subdivision: 28 U. S. C. § 2254(d). See *Lindh*, *supra*, 521 U. S., at 324. *Hohn*'s application of the § 2253 amendments may be read as an unwillingness to expand

Lindh beyond the specific holding of that case on the narrow question presented.

II. *Lindh* should not be extended beyond § 2254(d).

A. Landgraf and "Express."

In *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994), this Court clearly stated that in the absence of an express statement by Congress, the court *must* ask if application of the new statute would be retroactive. *Id.*, at 280. This statement must, of course, be considered in the context of the point being discussed. Notwithstanding the contrary statement in *Lindh*, *supra*, 521 U. S., at 325, the context indicated that the "express command" requirement worked both ways, *i.e.*, that the "judicial default rules" applied whenever Congress had not made an express statement to the contrary.

The statement is the conclusion of the section which resolves the tension between two canons of statutory construction. *Landgraf*, 511 U. S., at 263. "The first is the rule that 'a court is to apply the law in effect at the time it renders its decision . . . .' " *Id.*, at 264 (quoting *Bradley* v. *School Bd. of Richmond*, 416 U. S. 696, 711 (1974)). "The second is the axiom that '[r]etroactivity is not favored in the law . . . .' " *Ibid.* (quoting *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988)). The resolution was that the *Bradley* presumption would yield to the *Bowen* presumption when they were in conflict. *Id.*, at 277. With that exception, however, nothing in *Landgraf* indicates any backing off from the *Bradley* rule. The reason the court *must* inquire into retroactivity, it would seem, is because in the absence of retroactive effect the *Bradley* rule controls.

A two-way express-statement rule would "giv[e] legislators a predictable background rule against which to legislate." See *id.*, at 273. When these two rules cover the field, Congress can reasonably predict what rule will apply when it makes no express statement. Such a rule would most often implement the intent of Congress. When Congress acts to change a rule of law, it does so because it believes the new rule balances the competing interests better than the old rule. In the case of

"retroactive" application, though, that balance may be altered by a party's justified reliance on the old rule. Hence, the *Bowen* presumption prevents application in cases where the balance is most likely to differ from the one weighed by Congress. Where application would not be retroactive, the balance of interests is not much different from purely prospective application, and application of the new rule conforms most closely to Congress's assessment of the appropriate balance. The judicial default rules will often yield a better and fairer result than any simple rule Congress could write into the statute. Each provision of an act would be evaluated separately, "in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." *Id.*, at 280.

B. Lindh v. Murphy.

At issue in *Lindh* was the question of whether the new subsection (d) of 28 U. S. C. § 2254, added by AEDPA, applied in a noncapital case. The state naturally relied on the seemingly clear "express command" language of *Landgraf*. The *Lindh* majority answered this argument with the surprising assertion that the argument "ignores context." 521 U. S., at 325. As discussed *supra*, at 4-5, the argument is fully consistent with the context. *Lindh* then announces, in effect, that the seemingly clear two-step analysis of *Landgraf* is really a three-step analysis. Absent an *express* statement from Congress, the court must examine the statute for *implied* statements that the statute operates to some degree *more* prospectively than it would under the default rule. Only if no such implication were found would the court proceed to *Landgraf*'s second step, now the third step, of asking whether application would be truly retroactive. See *id.*, at 326.

The remainder of the *Lindh* majority's arguments consists of two steps: (1) Congress specified the temporal reach of the new Chapter 154 but not of the amendments to existing chapter 153 and therefore must have intended that they be different; (2) the intended difference must be pure prospectivity, *i.e.*, inapplicability to all cases in which the petition was filed before April 24, 1996, regardless of whether application would be retroac-

tive within the meaning of *Landgraf*. Both steps are non sequiturs.

Taking the second step first, assuming *arguendo* that Congress did have a different intent regarding chapter 153 than it had regarding chapter 154, it does not by any means follow that pure prospectivity of the entire chapter was that intent. The "inference that chapter 153 was not meant to apply to pending cases" is by no means "straightforward," see *Lindh*, 521 U. S., at 332, if that inference is meant to cover every application of every change made by §§ 101-106 of the AEDPA.

These amendments make many different kinds of changes. Application of some of those changes to pending cases present none of the fairness concerns that underlie the disfavored status of retroactive application, see, *e.g.*, 28 U. S. C. § 2254(b)(2) (denial of unexhausted claim on the merits); *Landgraf*, 511 U. S., at 265-267, and there is no conceivable reason why Congress would not want to apply such uncontroversial reforms to pending cases. Conversely, it would be wasteful and inefficient to apply the certificate of appealability requirement with total retroactivity, so as to require new certificates in cases already briefed on appeal under the old procedure.

Landgraf noted that Congress may deliberately decide not to decide retroactivity, with the intent that the courts will decide on the basis of judicially created default rules. *Id.*, at 260-261. That is, from the premise that Congress did not intend total retroactivity of every change made to chapter 153, it does not follow that Congress intended that *all* of those changes be inapplicable to pending cases. The thesis "that all those other provisions must be treated uniformly for purposes of their application to pending cases . . . is by no means an inevitable one." *Ibid.* The contrary was "highly probable" in *Landgraf*, *id.*, at 261, and it is highly probable here. That contrary thesis is that Congress intended that the courts would examine each provision and apply it to pending cases or not, based on whether its application would be unfairly "retroactive" under *Landgraf*. That different intent would fully "explain[] the different treatment," cf. *Lindh*, 521 U. S., at 329, be fully consistent with *Landgraf*, and be fully consistent with the value judgment of

Congress that the amended statutes balance the competing interests better than the earlier ones.

More fundamental than the question of *what* intent § 107(c) expressed about §§ 101-106 is the question of whether it expressed any intent at all. The lynchpin of this holding is the statement that nothing but a different intent explains the absence of a parallel provision in the chapter 153 amendments. *Lindh*, 521 U. S., at 329. Not so.

Chapter 154 is a fundamentally different kind of enactment from the amendments to chapter 153. The chapter 153 amendments are significant, but none depends for its operation on any of the others. Given *Landgraf*'s apparent assurance that the various provisions of an act would be considered individually, the need for an express statement as to all the chapter 153 amendments is diminished. Chapter 154, in contrast, can only be applied to a case as a coherent whole. It adopts a *quid pro quo* arrangement in which the state receives certain benefits in return for extending assistance to the prisoner above the constitutional minimum. See L. Powell, et al., Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 6 (1989), *reprinted in* 135 Cong. Rec. 24,694, 24,695, col. 2 (1989) ("Powell Committee Report"). An express statement on its application was therefore much more necessary than it was for chapter 153.

Even with regard to the individual provisions, *Lindh* overstates the similarity of the two chapters. Both chapters supposedly contain changes that "govern[] standards affecting entitlement to relief." *Lindh*, 521 U. S., at 329. But the *only* such provision cited for chapter 154 is its "incorporation" of the new § 2254(d) from chapter 153. See *id.*, at 327. This is the well-known fallacy of assuming the conclusion. If the "rival" interpretation of § 2264(b) is correct, see *id.*, at 339-340 (Rehnquist, C.J., dissenting), then chapter 154 does not make the new § 2254(d) applicable to any cases to which it would not otherwise apply, and therefore it does not make any change to the standards affecting entitlement to relief. The supposed similarity of the two chapters is an extremely thin reed on which to rest a negative implication.

The most clearly fallacious of the *Lindh* majority's arguments is the last one. The argument goes that the sole purpose of mentioning subdivisions (a), (d), and (e) of § 2254 in § 2264(b) is to make applicable to pending cases changes in those subdivisions that would otherwise be prospective only. The simple, obvious, and conclusive refutation to that interpretation is that § 2254(a) was not amended, and hence making changes to it retroactive could not possibly have been the Congressional purpose. Far from being a "loose end," cf. *Lindh*, 521 U. S., at 336, this is a knockout punch.

The "rival" analysis of the dissent is far more coherent than the one adopted by the *Lindh* majority. See *id.*, at 336; *id.*, at 339-340 (dissent). It accounts for and gives meaning to every word of the statute, rather than leaving a "loose end." Space does not permit a full discussion here, so we will simply refer to the dissent and to our brief in *Lindh*. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lindh* v. *Murphy*, No. 96-6298, pp. 19-21. We will add only one additional comment. The majority expresses doubt that Congress intended to relax the exhaustion rule and puzzlement as to why it would. 521 U. S., at 333-334, n. 7. The intent and reason for it are stated with crystal clarity in the Powell Committee Report, *supra*, at 22, 135 Cong. Rec., at 24,698, col. 2, and quoted in the dissent. 521 U. S., at 341, n. 2. Similarly, the reason for the "subject to" clause of § 2264(b) is easily seen by comparing the final language with the draft of the Powell Committee Report, at 22, 135 Cong. Rec., at 24,698, col. 2, which could have been interpreted to eliminate all other prerequisites to reaching the merits. The majority opinion's lack of awareness of this well-known, definitive legislative history casts further doubt on its already shaky analysis.

In a world of silk purses and pigs' ears, *Lindh* v. *Murphy* is not a silk purse of the art of statutory interpretation. Cf. 521 U. S., at 336. The narrow holding of *Lindh*, that § 2254(d) does not apply to cases filed before its enactment, is not at issue in the present case. A broader interpretation, that the chapter 153 amendments in their entirety do not apply, should be rejected in favor of applying the default rule to each remaining provision. There is no need in this case to overrule *Lindh*, but *amicus*

submits that the Court should decline to go beyond that decision, by even a fraction of an inch. Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

C. Martin v. Hadix, Stare Decisis, and Hairline Distinctions.

Last term in *Martin* v. *Hadix*, 527 U. S. __, 144 L. Ed. 2d 347, 119 S. Ct. 1998 (1999), this Court rejected a "negative implication" argument very similar to the one accepted in *Lindh*. *Martin* involved the cap on attorneys' fees enacted in the Prison Litigation Reform Act, Pub. L. No. 104-134, § 803(d)(3), 110 Stat. 1321-66; 42 U. S. C. § 1997e(d)(3). Following the successful path of the *Lindh* petitioner, Hadix and the other prisoners argued that Congress's omission of a provision for application to pending cases in § 803, while including one in § 802, implied that § 803 was completely inapplicable to any case pending on the date of enactment, even when application would not be "retroactive" within the meaning of *Landgraf*. See *Martin*, 144 L. Ed. 2d, at 358-359, 119 S. Ct., at 2004-2005.

The *Martin* Court noted that in *Lindh*, "[t]his argument carried special weight because both chapters addressed similar issues," *i.e.*, they both established "new standards for review . . . ." *Id.*, at 359, 119 S. Ct., at 2005. The "same negative inference [did] not arise" regarding §§ 802 and 803, however, because they "address wholly distinct subject matters." *Ibid.* This "similar" versus "distinct" subject matter distinction is nowhere near as clear from the face of the statutes as one might think from reading the *Martin* opinion. As noted earlier, the *Lindh* majority's conclusion that chapter 154 changed the substantive standards for review rested entirely on the fallacy of assuming the conclusion. See *supra*, at 7.

Nor are the subjects of §§ 802 (18 U. S. C. § 3626) and 803 (42 U. S. C. § 1997e) really *wholly* distinct. The subject of § 802 is "Appropriate remedies with respect to prison conditions." 18 U. S. C. § 3626, caption. In § 803, we also find a limitation on a remedy for prisoner: no damages for mental or emotional injury without physical injury. 42 U. S. C. § 1997e(e). Section 802 addresses procedure in prison conditions litigation. § 3626(e). So does § 803. § 1997e(f). The

specific provision at issue in *Martin* capped attorneys' fees with reference to the rate payable to appointed counsel for criminal defendants. § 1997e(d)(3). Section 802 contains a strikingly similar cap on fees payable to special masters. § 3626(f)(4). The line between "similar" and "distinct" subject matters is less than clear. *Martin* may well be correct that *Lindh* is distinguishable and that the statute at issue falls on the other side of whatever line *Lindh* draws, but that conclusion, however correct, offers minimal guidance for deciding the next case.

The tension between *Martin* and *Lindh* does not end with this hairline distinction, though. In reaching its holding regarding fees earned after the effective date, *Martin* implicitly rejects a central feature of the *Lindh* decision. The inferences of pure prospectivity that the prisoners sought to draw from the statute and its history were, indeed, "weak." See *Martin*, 144 L. Ed. 2d, at 360, 119 S. Ct., at 2006. They were not, however, zero, and *Martin* cites no inferences whatever on the other side of the scale. If a mere preponderance were sufficient, anything at all would beat nothing at all. Yet *Martin* rejects the weak inferences and applies the new law in those circumstances where its application would not be retroactive. *Id.*, at 361-362, 119 S. Ct., at 2007.

The presumption in favor of applying current law whenever it would not be "retroactive" *does* carry some weight in interpretation of the statute, after all. That is, by enacting the statute, Congress has declared that the new law is better than the old one and presumably wants that new, better law to apply whenever its application would not cause a "manifest injustice." See *id.*, at 362, 119 S. Ct., at 2007. At its bottom line, *Martin* holds that the absence of an express command plus the absence of a retroactive effect suffice to make the new law applicable. *Ibid.* This holding contradicts the holding of *Lindh* that a mere preponderance of one interpretation over another was sufficient to delay the effect of Congress's reforms well beyond the point of nonretroactivity. Cf. *Lindh*, 521 U. S., at 336.

Before a rule of law can be respected and obeyed, it must be discernable. See *Douglas* v. *Jeannette*, 319 U. S. 157, 182 (1943) (Jackson, J., concurring in the judgment). A lower court trying to do its duty to obey the precedents in both *Lindh* and

Martin will find the task nearly impossible. The goals of stability and predictability that underlie *stare decisis*, see *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991), would be better served by frankly rejecting *Lindh*'s negative inference thesis and embracing a predictable background rule. See *United States* v. *Dixon*, 509 U. S. 688, 712 (1993) (overruling case was preferable to pretending it survived when it did not).

The clearest, simplest, and, *amicus* submits, best rule is simply to apply the "express command" requirement both ways. In the absence of an express command, the anti-retroactivity presumption blocks any application of the new statute that would have retroactive effect, and in all other circumstances the presumption in favor of applying current law controls.

A lesser step, sufficient to resolve the present case, would be a categorical rejection of the negative implication argument. Congress should be able to state the temporal scope of one provision without fear of the unintended consequence of limiting the temporal scope of another provision. Statutes are not enacted by a single individual with a single intent. They are products of negotiation and compromise. Negotiation may focus on one provision at a time, with little regard for other sections as language is hammered out. That difficult process is made more difficult if language must be scrutinized not only for what it says and does but also for any conceivable effect it may have on other sections.

The amendments to § 2253 are purely procedural, do not affect primary conduct, and do not impact any legitimate reliance interests. They should apply, as *Hohn* applied them, to all cases appealed after April 24, 1996.

III. A certificate of appealability requires a substantial claim on the merits, not procedure.

Section 102 of the AEDPA amended 28 U. S. C. § 2253 as set forth in Appendix A. In the first two paragraphs and the header language of the third, Congress made stylistic changes, extended the requirement to cover federal prisoners, and changed the name from "certificate of probable cause" to

"certificate of appealability" ("COA"). New subdivision (c)(2) largely codifies the standard of *Barefoot* v. *Estelle*, 463 U. S. 880, 892, n. 3 (1983). It also limits the substantive grounds to denial of constitutional rights, thus focusing the inquiry on the actual claims for relief, not the procedural prerequisites. New subdivision (c)(3) requires the certificate to specify the issue which satisfies the paragraph (2) requirement. "The whole point of the new procedure is to limit appeals to issues on which a substantial showing of the denial of a federal constitutional right has been made." *Burns* v. *Gammon*, 173 F. 3d 1089, 1090, n. 2 (CA8 1999).

As applied to an appeal from the district court's denial of a constitutional claim on the merits, the statute is straightforward. Petitioner must meet the *Barefoot* standard for each claim. Only issues meeting this standard are cognizable on appeal. See *ibid.* Applying this statute to issues dismissed on procedural grounds seems to have raised groundless fears that review of issues would be blocked if the statute were applied as written. *Amicus* CJLF suggests that a simple, straightforward application that respects both the statutory language and the intent of the act is available.

The most consistent theme throughout the AEDPA reforms is to cut down on the number of different proceedings that must be held before a case is truly final. We see this in the severe restriction on successive petitions. 28 U. S. C. § 2244(b). We see it in the limitation on evidentiary hearings. 28 U. S. C. § 2254(e)(2). Most pertinent to the present question, we see it in the authorization to dismiss meritless, unexhausted claims in 28 U. S. C. § 2254(b)(2). Congress has expressed its judgment that cases should not be bounced around between courts on preliminary procedural questions when the underlying claim is obviously without merit.

On its face, § 2253(c)(2) requires the judge considering a certificate application to look at the merits of the underlying claims and not the procedural prerequisites to granting relief. If there is a substantial claim on the merits, the appeal should go forward. If there is not, the case should end with the district court's denial.

The question of whether an appeal can proceed is distinct from the questions of what issues the appellate court can or must consider and what relief is available if it finds the district court erred. If the underlying claim has substance, the petitioner/appellant can appeal any adverse rulings on the procedural prerequisites. The requirement of a showing of a substantial claim on the merits does not depend on whether the district court ruled on the merits. The statute unambiguously requires the showing for all appeals. Conversely, the statute does not require any showing at all on the procedural prerequisites. Petitioner gets the certificate even if his arguably meritorious claim is unarguably defaulted. He may, however, simply get a summary affirmance with his certificate, so long as he has an opportunity to brief his case. See *Barefoot*, *supra*, 463 U. S., at 893-894 (expedited procedure may be appropriate, despite issuance of certificate).

The procedures devised by the courts of appeals are less consistent with the language and purpose of the statute and ultimately less efficient. In *Murphy* v. *Johnson*, 110 F. 3d 10, 10 (CA5 1997), the district court had dismissed the petition for nonexhaustion. Relying on pre-AEDPA precedent, *Murphy* held that the applicant for a COA must make "a credible showing of exhaustion," before the court would consider whether his underlying claim met the *Barefoot* standard. *Id.*, at 11. The new statute quite simply does not say that. Whether a constitutional right has been denied and whether state remedies have been exhausted are entirely separate questions.

From the standpoint of avoiding unjust results, it makes sense to apply the certificate filter to the merits and not the procedural ground. If a meritorious claim has been denied on procedural grounds, that procedural ruling deserves careful scrutiny, as a miscarriage of justice is possible. On the other hand, if the underlying claim is clearly meritless, it really does not matter if the district court erred on the procedure; no harm has been caused.

In *Whitehead* v. *Johnson*, 157 F. 3d 384 (CA5 1998), the Fifth Circuit got the statute completely backwards. The district court had dismissed Whitehead's petition for nonexhaustion. *Id.*, at 386. The court of appeals applied the first part of its

Murphy test holding that Whitehead not only had a "credible" case on exhaustion, but that he prevailed on the point. *Id.*, at 387. The court granted the COA, vacated the judgment, and remanded for a decision on the merits without applying the statutory standard to the merits. *Id.*, at 388. The reason given for this action was the requirement that the district court address each issue first. *Ibid.*

There are two problems with this justification: one legal and one practical. The legal problem is that the requirement that the district judge consider every issue before the court of appeals is not a Congressional command. FRAP Rule 22(b) does contemplate that the district judge should consider the application as a whole first, but, if the district judge should err, the remedy expressly provided is a new application to the circuit judges. On the other hand, § 2253(c) *is* a Congressional command. That statute forbids the court of appeals from disturbing the district court's decision until a certificate has issued, and it further forbids the issuance of the certificate until a judge has determined that the petitioner has a substantial claim on the merits.

The *Whitehead* case illustrates the practical wisdom of Congress's choice and the wastefulness of the Fifth Circuit approach. Whitehead's claim involved the calculation of "time credits" for a person with multiple sentences. See 157 F. 3d, at 385-386. Whatever merit this claim might have under state law, the allegation that the calculation violates the Constitution appears quite far-fetched. If the court of appeals had simply applied the *Barefoot* standard to the merits as its first step, it likely would have ended the litigation right there. Instead it decided the exhaustion issue and sent the case back to district court, requiring a new proceeding and decision there, another application for a certificate, and, if it is denied, another application to the court of appeals. This is the kind of multiplication of proceedings that Congress sought to eliminate.

Another line of cases effects a partial judicial repeal of the statute by conjuring up the "preclude all review" bogeyman. *Nichols* v. *Bowersox*, 172 F. 3d 1068, 1070 (CA8 1999) (en banc) involved the purely procedural question of timely filing and the "mailbox rule." The court construed § 2253(c) as being

completely inapplicable to such procedural appeals. "Otherwise, a final order entered by a district court based upon a question antecedent to the merits, if adverse to the petitioner, could never be reviewed on appeal." *Id.*, at 1070, n. 2.

The problem, again, is that this holding flies in the face of an unambiguous Congressional command. Section 2253(c) does not say "the final order, if decided on the merits." It just says "the final order." As Judge Arnold noted in dissent, there is a simple solution to the perceived problem that respects this clear language: "A requirement that the prisoner make some kind of abbreviated showing on the merits (perhaps in an appropriate case accompanied by an offer of proof) before he or she can take an appeal, even on a matter unconnected with the merits, is a perfectly rational (if rather cumbersome) one." *Id.*, at 1078 (dissenting opinion). Preliminary procedural questions are thus not precluded from review, but review is limited to petitioners with some realistic chance of prevailing on the merits.

A COA should issue when, and only when, the habeas petitioner has made a substantial showing of merit on one or more of his substantive claims. As no such showing has been made in the present case, no certificate should issue.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit denying a certificate of appealability should be affirmed.

December, 1999

Respectfully submitted,

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APPENDIX A

28 U. S. C. § 2253. Appeal*

(a) In a habeas corpus proceeding *or a proceeding under section 2255* before a ~~circuit or~~ district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit ~~where~~ *in which* the proceeding is ~~had~~ *held*.

(b) There shall be no right of appeal from ~~such an~~ *a final* order in a proceeding to test the validity of a warrant to remove~~,~~ to another district or place for commitment or trial; a person charged with a criminal offense against the United States, or to test the validity of ~~his~~ *such person's* detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an ~~An~~ appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding ~~where~~ *in which* the detention complained of arises out of process issued by a State court ~~,unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.~~*; or*

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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* As amended April 24, 1996, by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1214, 1217-1218. Added language is in italics, and deleted language is in strikeout type.

DEC 15 1999

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No. 98-6322

In The

Supreme Court of the United States

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. McDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

This Court granted certiorari to address the following question:

> If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing 'second or successive' habeas applications?

After briefing and oral argument, the Court ordered supplemental briefing and reargument on the following issues:

(1) Do the provisions of AEDPA, specifically including 28 U.S.C. § 2253(c) and 28 U.S.C. § 2244(b), control the proceedings on appeal?

(2) If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. § 2253(c)?

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I. Introduction

In the previous briefing, petitioner Slack demonstrated that a habeas corpus petition is not a "second or successive" application within the meaning of Rule 9(b) of the Rules Governing Section 2254 Cases, when previous petitions have been dismissed "without prejudice" for exhaustion of state remedies.[1] The intent of Congress in enacting Rule 9(b) was to limit repeated applications for writs of habeas corpus after previous petitions had been fully litigated, not to apply a res judicata rule on the basis of a prior dismissal without prejudice. Congress itself inserted the "abuse of the writ" terminology in Rule 9(b), and explicitly stated that "[t]he abuse of the writ standard brings Rule 9(b) into conformity with existing law." H.R. Rep. No. 94-1471 at 5, reprinted in U.S. Code, Cong. and Admin. News at 2482 (1976). In 1976, "existing law" included former 28 U.S.C. § 2244(b). That provision made it absolutely clear that a subsequent petition could not be dismissed unless a previous petition had been decided on the merits. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 1625 (1998) (Thomas, J., dissenting); see also Rules Governing Section 2255 Cases, Rule 9(b) (using identical terminology with respect to § 2255 motions, in which dismissals for exhaustion do not exist.) Thus petitioner must prevail on the issue upon which this Court originally granted certiorari because his habeas corpus application, filed after a previous dismissal without prejudice for exhaustion, cannot be "second or successive."

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[1] This is the only rule consistent with the "without prejudice" character of a dismissal for exhaustion under *Rose v. Lundy*, 455 U.S. 509 (1982) which can have no preclusive effect, *see Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 1621 (1998); and it is the only rule that recognizes the abuse of the writ doctrine as a "modified res judicata rule," *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *McCleskey v. Zant*, 499 U.S. 467, 489-490 (1991), which depends upon a "prior adjudication" to apply. *Id.* at 482.

In response to the amicus curiae brief filed by various state attorneys general, this Court ordered briefing on whether the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to this case and, if so, whether a certificate of appealability can issue under 28 U.S.C. § 2253(c). AEDPA does not apply to this case at all and, even if it did, AEDPA does not leave the federal appellate courts powerless to address procedural errors in habeas corpus cases.

AEDPA clearly does not apply to this case. Even if the state had not waived any issue as to the applicability of AEDPA by failing to invoke the Act in the district court or the court of appeals, AEPDA still could not apply here because Mr. Slack indisputably commenced this action by filing a petition for writ of habeas corpus in the district court before the enactment of AEDPA. Mr. Slack's case was therefore one of the "cases pending" prior to AEDPA, to which the amendments to Chapter 153 do not apply under *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997). Both the successive petition provisions of 28 U.S.C. § 2244(b), and the appeal provisions of 28 U.S.C. § 2253, are contained in the Chapter 153 amendments of the Act and amici have not offered any rational theory upon which to avoid the force of the holding in *Lindh*. Holding that parts of AEDPA apply to pending cases while others do not would lead to the kind of confusion that characterized the welter of conflicting cases before *Lindh* resolved these issues by imposing a simple, bright-line rule of application, based upon the intent of Congress.

Even if AEDPA applied to this case, it would not change the result. The certificate of appealability provisions of AEDPA do not make the radical change in the availability of appellate review invented by amici. Congress intended that the certificate of appealability provision retain the substantive standard of *Barefoot v. Estelle*, 463 U.S. 880 (1983) – which allowed for review of procedural and substantive questions – and appellate review in this case remains available under

Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969 (1998). Substantively, it does not matter whether AEDPA governs review of this case because the definition of "second or successive" petition is the same under AEDPA and pre-AEDPA law, and that definition does not include petitions filed after previous petitions have been dismissed without prejudice for exhaustion. *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1621-22. This Court therefore must resolve the question on which it granted certiorari and hold that Mr. Slack's habeas corpus application was not "second or successive."

II. The State Has Waived Any Right To Rely Upon AEDPA Under Any Of The Theories Posed By This Court's Order For Further Briefing.

The two questions presented for further briefing cannot form the basis for a judgment in favor of the state respondents because they have waived any reliance on the legal arguments posed by the Court's questions. The state never argued that any provision of AEDPA applied, either in the district court or the court of appeals, and it affirmatively argued in this court that AEDPA does not apply.[2] The district court and the

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[2] Mr. Slack's current habeas corpus proceeding was commenced on May 20, 1995, with the filing of a petition in district court. JA 35. Pursuant to the district court's order, the amended petition at issue here was filed on December 24, 1997. JA 66. At no time in the lower court proceedings did respondents suggest in any way that any portion of AEDPA applied to the proceedings in this matter. The state's motion to dismiss the amended petition, filed after the adoption of AEDPA, did not rely on or mention AEDPA. JA 92. When petitioner sought a certificate of probable cause for appeal, relying on pre-AEDPA standards, JA 163, the state's opposition (filed after the district court's denial of the certificate of probable cause, JA 182, 184, but transmitted to the court of appeals along with the record), did not claim that the certificate of appealability standards of AEDPA applied. The state did not claim that the procedural issues involved were unreviewable; instead, it argued under the standard of *Barefoot v. Estelle* that a certificate of probable cause should not be issued because the procedural issues were frivolous in light of *Farmer v. McDaniel*, 98 F.3d

court of appeals, which denied certificates of probable cause under pre-AEDPA law, did not apply the Act. *E.g.*, *Miree v. Dekalb County*, 433 U.S. 25, 34 (1977); *cf. United States v. Williams*, 504 U.S. 36, 40-45 (1992) (court of appeals passed on issue raised in petition for certiorari although not raised by party). This case is therefore indistinguishable from *Buchanan v. Angelone*, in which this Court held that a claim that the petitioner "belatedly attempted to adopt at oral argument . . . was waived, since . . . petitioner never raised this claim previously." *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 762 n.4 (1998); Sup. Ct. Rule 15.2. Here, the state seeks to preclude federal court consideration of Mr. Slack's substantial constitutional claims by invoking entirely procedural impediments. It would be grossly unequal treatment to allow the state, in the same proceeding, to ignore procedural rules itself.

The arguments advanced by the attorney general amici do not involve this Court's subject matter jurisdiction or that of the lower courts. Every court of appeals has held that a state waives reliance on AEDPA by failing to invoke the statute.[3]

1548 (9th Cir. 1996), *cert. denied*, 520 U.S. 1188 (1997). JA 185-186, 195. The state also distinguished cases cited by the petitioner in part on the ground that those cases arose under AEDPA. JA 187-188. The state did not argue that the underlying constitutional claims asserted by petitioner were not substantial ones. JA 184-195. Both the district court and the court of appeals denied certificates of probable cause, under pre-AEDPA law, not certificates of appealability. JA 182, 197. Finally, the state respondents explicitly argued in this Court that AEDPA is irrelevant to this case. Resp. Br. at 29-30; 40 ("Slack's arguments center around 28 U.S.C. § 2244 as amended by the AEDPA. *This statute does not govern Slack's petition and the issues Slack raises are not before this Court.*" (Emphasis supplied.)) The state's brief also did not adopt the arguments made by the attorney general amici. Only at oral argument, under questioning by the Court, did counsel for the state purport to join in amici's arguments under AEDPA.

[3] *Emerson v. Gramley*, 91 F.3d 898, 900 (7th Cir. 1996), *cert. denied*, 520 U.S. 1122, 1139 (1997); *Arnold v. Evatt*, 113 F.3d 1352, 1362 n.57 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 715 (1998); *Belgarde v. Montana*, 123

The state therefore cannot properly assert amici's arguments that any part of AEDPA applies on the theory that the amended petition and the notice of appeal were filed after its enactment, because those arguments have been waived by the state's failure to make them in the district court or the court of appeals. Similarly, the state cannot properly rely upon any argument with respect to the permissible scope of a certificate of appealability, since that argument was never previously made.[4] Accordingly, respondents have waived any right to assert amici's arguments.

III. AEDPA's Amendments To Chapter 153, Including The Amendments To 28 U.S.C. §§ 2253 And 2244(b), Do Not Govern The Appellate Proceedings In Mr. Slack's Case, Which Was Commenced Before April 24, 1996

The successor petition and appeal provisions of AEDPA do not apply to Mr. Slack's case. This Court held in *Lindh v. Murphy*, 521 U.S. at 326-27, that the Chapter 153 provisions of the Act do not apply to "cases pending" before its enactment, based on the clear contrast with the explicit Congressional intent to apply the Chapter 154 provisions to "cases

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F.3d 1210, 1214 n.5 (9th Cir. 1997); *Davis v. Executive Director of Dept. of Corrections*, 100 F.3d 750, 755 n.1 (10th Cir. 1996), *cert. denied*, 520 U.S. 1215 (1997).

[4] The certificate provision is a screening mechanism, not a jurisdictional element carrying a substantive content independent of the issues on appeal. *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997) (defect in certificate of appealability does not implicate subject matter jurisdiction and issue waived by government's failure to raise it), *cert. denied*, 118 S.Ct. 2324 (1998); *accord Gatlin v. Madding*, 189 F.3d 882, 886-87 (9th Cir. 1999) (per Rymer, J.) (failure of state to oppose request for certificate of appealability to review exhaustion issue waived any issue as to propriety of certificate); *United States v. Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998) (failure to object to erroneously-issued certificate of appealability waives issue), *cert. denied*, 119 S.Ct. 1079 (1999).

pending" at the time the Act took effect. Mr. Slack indisputably filed his petition for writ of habeas corpus before AEDPA's enactment. JA 35. A "case," once begun, remains "pending" until final on appeal. "An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of." *Mackenzie v. Engelhard & Sons Co.*, 266 U.S. 131, 142-43 (1924) (per Holmes, J.); *see Hohn v. United States*, 118 S.Ct. at 1974-75. This Court's ruling in *Lindh* is therefore controlling.

In *Lindh*, this Court held that Congress intended to exclude *all* non-capital and non-opt-in capital cases filed on or before April 24, 1996 from the application of *all* the habeas corpus and § 2255 revisions made by AEDPA. This Court concluded that the statutory language of AEDPA, examined as a whole, "reveals Congress' clear intent to apply the amendments to Chapter 153 only to such cases as were filed after the statute's enactment (except where Chapter 154 otherwise makes select provisions of Chapter 153 applicable to pending cases)." 521 U.S. at 326; *see also Landgraf v. USI Film Products*, 511 U.S. 244, 263-64, 272-73, 286 (1994).[5] Virtually every pertinent post-*Lindh* decision explicitly or

[5] This Court's reference to "select provisions" of Chapter 153 explains its statement that "the new provisions of Chapter 153 *generally* apply only to cases filed after the Act became effective," *Lindh*, 521 U.S. at 336 (emphasis added), which does not imply that the *Lindh* court was undermining its own holding. Some of the new provisions of Chapter 153, such as the appeal and successive petition provisions, are common to all types of habeas proceedings, including Chapter 154 proceedings, since Chapter 154 does not contain parallel appeal and successive petition provisions. *See Lindh*, 521 U.S. at 335-36. To the extent that the opt-in provisions of Chapter 154 apply to pending cases, the "new provisions" of Chapter 153 common to all habeas cases could also apply to these qualifying Chapter 154 cases. Thus *Lindh* was accurate in saying that the new provisions of Chapter 153 "generally" could not be applied to pending cases, because those provisions could not be applied to pending non-capital (or capital non-opt-in) cases, but they could be applied in the limited situation where an opt-in capital case qualified for such retroactive application under Chapter 154.

implicitly confirms this analysis. In *Dickey v. United States*, 118 S.Ct. 2365 (1998), this Court granted certiorari, vacated and remanded for reconsideration in light of *Lindh* a lower court decision applying AEDPA's amended § 2253 in a § 2255 case in which the appeal was filed after, but the § 2255 motion was filed before, April 24, 1996.[6] The GVR order in *Dickey* makes sense only if § 2253 does not apply to any case commenced before AEDPA's enactment, even if the appellate proceedings begin afterward.[7]

The courts of appeals have almost unanimously recognized that AEDPA is inapplicable to a case in which a federal

[6] This Court issues GVR orders only when "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests on a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *Stutson v. United States*, 516 U.S. 193 (1996).

[7] This Court's decision in *Hohn* is not to the contrary. There, prior to *Lindh*, this Court denied certiorari on the propriety of applying new § 2253 to pending cases while granting certiorari on other issues. *See Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996) (per curiam), *cert. granted in part & denied in part*, 118 S.Ct. 361 (1997), *vac'd & remanded*, 118 S.Ct. 1969 (1998). On review, the Court treated the case as if it were subject to AEDPA, *see Hohn v. United States*, *supra*, 118 S.Ct. at 1972, an action consistent with the Court's denial of certiorari on this particular issue, which rendered the Eighth Circuit's ruling on the issue the "law of the case" without implying any validation of the ruling by this Court. *See Brown v. Allen*, 344 U.S. 443, 488-97 (1953). In resolving the issue on which certiorari was granted, the Court did not express or indicate any views on the propriety of the Eighth Circuit's ruling on the applicability of AEDPA to the case and, indeed, framed its holding in terms that expressly covered pre-AEDPA certificates of probable cause as well as AEDPA certificates of appealability. *See id.* at 1977 (overruling *House v. Mayo*, 324 U.S. 42 (1945) (per curiam), which held that the Court "lack[s] statutory certiorari jurisdiction to review refusals to issue certificates of probable cause"). Because *Hohn* is silent on the question at issue here, while the Court's later decision in *Dickey* suggests that the Eighth Circuit's approach is inconsistent with *Lindh*, *Hohn* provides no support for the proposition that the amendments to § 2253 apply here.

habeas corpus petition or § 2255 motion was filed on or before April 24, 1996, regardless of the timing or status of the appeal at any point thereafter.[8] The Third Circuit properly analyzed this issue in *United States v. Skandier*, 125 F.3d 178, 180-82 (3d Cir. 1997):

> The essential message of *Lindh*, we believe, is that we need not resort to default rules of retroactive/prospective application when the intent of Congress is clear and no Constitutional violation would be worked by applying the statute as Congress intended. . . . We conclude that the most plausible reading of the Court's language is that the amendments to Chapter 153 should not be given retroactive effect unless expressly provided for elsewhere in the text of the Act and that that reading is most consistent with the tenor and analysis of *Lindh*. Thus, since § 2253(c) is part of Chapter 153, we hold that that section should not apply to a § 2255 motion that was filed before AEDPA's effective date. Because we dispose of the case on the grounds of Congressional intent, as the Supreme Court itself has found it, we need not address the matters that would be predicate to determining the applicability of the default rules. Nor are we persuaded that the filing of a notice of appeal after AEDPA's effective date institutes a new proceeding such that we could find that Skandier's case was not pending on April 24, 1996 and thus that the new § 2253(c) should apply. Rather, we believe that the better view for present purposes is that there is but one case, which commences with the filing of the petition or motion and continues throughout the appellate process. Thus, so long as the § 2255 motion was filed before April 24, 1996, there was a case pending on that date even if the notice of appeal was filed after that date. At all events, we are controlled by *Lindh*, and our decision here is compelled by the Court's reasoning in that case.

[8] Because of the number of these cases, and the extreme limitation on the length of this brief, petitioner has compiled the Court of Appeals cases recognizing that AEDPA is inapplicable to a case in which a federal habeas corpus petition or § 2255 motion was filed on or before April 24, 1996 – which include decisions from the First, Second, Third, Fifth, Sixth, Ninth, Tenth, Eleventh and District of Columbia Circuits – in an accompanying appendix.

Accord, *Crowell v. Walsh*, 151 F.3d 1050, 1051-52 (D.C. Cir. 1998) (noting express disapproval in *Lindh* of contrary ruling in *Hunter v. United States*, 101 F.3d 1565, 1569 (11th Cir. 1996) (en banc)).

Crowell also analyzes and rejects the Eighth Circuit's ruling in *Tiedeman v. Benson*, 122 F.3d 518, 520-21 (8th Cir. 1997), the one decision that has strayed from the otherwise solid wall of circuit authority on this issue. *Tiedeman* relies upon a retroactivity, rather than statutory intent, analysis to conclude that AEDPA's amendment of 28 U.S.C. § 2253 applies to cases in which a petition was filed before April 24, 1996, if the appeal was filed after that date.[9] Contrary to the Eighth Circuit's position, the Congressional intent that the Chapter 153 amendments apply only to "cases" filed after the statute's enactment (as this Court held in *Lindh*, 521 U.S. at 326) is controlling. *See also Landgraf*, 511 U.S. at 263-64, 286. In enacting AEDPA, Congress sought to reduce confusion and delay in habeas proceedings. Adopting a rule that would apply different versions of the habeas corpus statutes

[9] The Eighth Circuit's analysis was also premised on an express concession by both parties, and adopted by the court, that the new provisions of § 2253 were substantively identical to the old ones, which eliminated any need to analyze adequately whether retroactive application of the appeal provisions was permitted by *Lindh* or *Landgraf*. *Id.* at 521. The *Tiedeman* position has been questioned by other panels of the same circuit. *See Ramsey v. Bowersox*, 149 F.3d 749, 759-60 (8th Cir. 1998); *Roberts v. Bowersox*, 137 F.3d 1062, 1067-68 (8th Cir. 1998)

to the same case, depending on how far that case had progressed through the federal courts, would engender substantial confusion and create increased litigation. *Cf. Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (importance of clear and specific rules in habeas proceedings).

The "second or successive" petition provisions of AEDPA, 28 U.S.C. § 2244(b), also do not apply here. The brief of the amici state attorneys general does not cite a single authority remotely suggesting that the filing of an amended pleading begins a new habeas "case." To the contrary, an amended pleading is a continuation of the pending action. *See* 28 U.S.C. § 2242 (habeas petition "may be amended or supplemented as provided in the rules of procedure applicable to civil actions."); *United States v. Skandier*, 125 F.3d at 182; see also *Hohn v. United States*, 118 S.Ct. at 1974-75; *Mackenzie v. Englehard & Sons Co.*, 266 U.S. at 142-3. Mr. Slack's "case" was indisputably "pending" before the enactment of AEDPA, and there is no rational basis for disregarding *Lindh* because of the filing of an amended pleading.[10] There is no basis in the language or legislative history of AEDPA (any more than there is in the language or legislative history of Rule 9(b)) suggesting an intent to turn the abuse doctrine into

[10] *Lindh*'s reasoning itself compels the conclusion that an amended pleading cannot constitute a new "case." Congress included a specific provision only in the opt-in scheme of Chapter 154 for treating an attempt to amend as if it were an attempt to file a "second or successive" petition. 28 U.S.C. § 2266(b)(3)(B). That distinction in treatment conclusively shows that Congress intended that an amendment could not be treated as a "second or successive" petition under Chapter 153. This conclusion is also consistent with the abuse of the writ doctrine itself, which is a "modified res judicata rule." *Felker v. Turpin*, 518 U.S. at 664. An amended pleading almost never follows an adjudication of the claims of any previous pleading, so the primary requirement of res judicata – a prior adjudication – is as much absent with respect to an amendment as it is to a previous dismissal without prejudice for exhaustion.

a mere anti-amendment rule. See Pet. Br. at 27-31; *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1622.[11]

IV. Applying The Chapter 153 Amendments To Cases Like Mr. Slack's – Where The Case Was Commenced Before The Passage Of AEDPA But The Appeal Was Commenced Afterward – Would Undermine The Straightforward Result In *Lindh* By Creating Substantial Confusion As To Which Statutory Provisions Would Govern On Appeal And By Creating The Potential For Applying Different Rules On Appeal Than Were Used At Trial

The bright line drawn by AEDPA distinguishes "cases pending on . . . [t]he date of enactment of this Act," from cases that were not. Pub. L. 104-132 § 107(c). AEDPA and *Lindh* makes the pendency of the "case" as a whole, and not the "appeal" or some other "stage" of the case the critical point; and the statute's bright-line character is preserved only by treating the case's original filing date as determinative of the applicability of all portions of AEDPA. This clarity is imperative because, pre-*Lindh*, the lower courts had formulated many conflicting rules regarding the timing of the application of AEDPA's provisions, including the amendments to 28 U.S.C. § 2253. One of *Lindh*'s substantial virtues is that it ended disagreement on the subject of the application of AEDPA's provisions. Indeed, other than the Eighth Circuit's ruling in *Tiedeman*, every other post-*Lindh* ruling has held

[11] Any argument to the contrary would founder on the principle that Congress did not intend absurd results. Claims in a "second or successive" petition are almost necessarily barred under AEDPA: Claims raised in a previous petition are absolutely barred, 28 U.S.C. § 2244(b)(1), and new claims are barred except in extraordinarily narrow circumstances, 28 U.S.C. § 2244(b)(2). If an amended petition were considered a "second or successive" one, the mere filing of an amended petition would eliminate any habeas review, since both claims raised in the pre-amendment petition and new claims would be barred. If Congress intended so radical and absurd a result, it would have said so.

that, if a "case" originally was commenced on or before April 24, 1996, then pre-AEDPA law governs at all stages of the case, including stages initiated after that date by filing an amendment to the original habeas corpus petition or § 2255 motion, or filing a notice of appeal.[12]

The *Tiedeman* decision ignores Congress' clear intent, recognized by this Court in *Lindh*, to treat Chapter 153 "cases" differently from Chapter 154 cases, and it fails to acknowledge Congress' legitimate concern with drawing a clear line of demarcation regarding when AEDPA should be applied. The only arguable rationale for *Tiedeman* is that it treats the appeal as the commencement of a new "case." Brief of Attorney General Amici at 8-9. Such a rule would have no conceivable limiting principle, because if the appeal constitutes a new "case," then **all** of AEDPA's provisions would govern this new "case." Thus, the appellate proceedings – or the appeal "case" in amici's terms – would not only be governed by the amended provisions of § 2253, but also by the provisions of amended § 2244 and § 2254 (which would be in flat contradiction to the explicit holding of *Lindh* with respect to § 2254).

The problems with such a rule are manifest. First, any such rule would run afoul of this Court's decision in *Hohn v. United States*, 118 S.Ct. 1969 (1998). In that § 2255 proceeding, the Court concluded that a preliminary pleading filed in a court must be treated, for jurisdictional purposes, as an indivisible part of the overall "case" in that court. *Id.* at 1974-1975 (denial by district court of leave to file habeas petitions was "judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals" since presentation of petition was "institution of a suit").

Second, any rule that would treat the district court proceedings as one "case" and the appellate court proceedings as a separate "case" would lead to absurd results. Under the erroneous pre-AEDPA law of the Ninth Circuit, which is

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[12] *See* fn. 6, above.

under review here, Mr. Slack's petition (filed after a previous dismissal without prejudice for exhaustion) was treated as a "second or successive" petition under *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996). Under post-AEDPA law, it could not be a "second or successive" petition. *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1622; *In re Turner*, 101 F.3d 1323 (9th Cir. 1997). If AEDPA applies to the proceedings on appeal, the court of appeals would be required to remand this case to the district court; but if pre-AEDPA law governs the district court proceedings, the district court could maintain that it was still bound by *Farmer*. Such a situation would be simply absurd.

Similar examples abound, since confusion will necessarily arise from using different rules on appeal than apply during the trial court proceedings. For example, would the standard of review provisions of amended § 2254(d) apply to appellate proceedings commenced after the passage of AEDPA, despite the holding in *Lindh*, even though the pre-AEDPA standard of review provisions had been applied by the trial court? If so, how would the appellate court review a decision of the district court that was rendered under one substantive standard when its review is governed by an altered substantive standard? Would the statute of limitations provisions of § 2244(d) govern appellate proceedings commenced after AEDPA's enactment and, if so, does this mean that even if the district court addresses the entire pre-Act petition on the merits, the appellate court must apply the Act's statute of limitations, which was not in place when the petition was filed in the district court? Under amici's analysis, the answer to all of these questions would appear to be "yes," but such results would be absurd. Congress, in attempting to clarify habeas procedure, cannot have intended to adopt a confusing regime, productive of increased litigation, where different rules govern the appellate proceedings than governed the trial proceedings in the same case. *See Landgraf*, 511 U.S. at 291-92 (Scalia, J. concurring in judgment) ("relevant retroactivity event" analysis would not require reversal

on appeal on basis of admission of evidence proper at time of trial). This Court should squarely reject the position advanced by amici and by the Eighth Circuit, and hold instead that if the "case" was originally filed on or before April 24, 1996, then pre-AEDPA law governs at all stages of the case.

V. Assuming Arguendo That The Provisions Of AEDPA Apply To This Case, A Certificate Of Appealability May Properly Issue Under 28 U.S.C. § 2253(c) Because Mr. Slack's Case Involves The Denial Of Substantial Constitutional Rights, Which Can Be Reviewed Only By First Addressing The Threshold Procedural Issue Resolved By The District Court

Even assuming *arguendo* that AEDPA could apply to this case, it remains clear that a certificate of appealability properly can issue under amended § 2253(c). The state attorney general amici argue in their brief that the adoption of 28 U.S.C. § 2253(c) by AEDPA removed any jurisdiction in the federal appellate courts to correct procedural errors committed by the district courts, but only when those errors favor the state. According to amici, Congress accomplished this by codifying the standard for issuing a certificate of appealability as requiring "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), rather than "a substantial showing of the denial of a federal right," which was the language used in the judicial decisions to describe the necessary showing for a certificate of probable cause. *Barefoot v. Estelle*, 463 U.S. 880 (1983). Amici's argument on this point has been rejected by every court of appeals to consider it, and Congress could not have reasonably intended that AEDPA radically change habeas practice as suggested by amici.

A. The History Of The Appealability Provisions Demonstrates Both The Longstanding Practice Of Considering Appeals By Habeas Corpus Petitioners On Procedural Issues, And The Established Nature Of The Appealability Standard Set Forth By This Court In *Barefoot v. Estelle*

In 1908, Congress decided to reduce the time spent on meritless habeas corpus appeals, which were previously allowed as a matter of right, by adopting the requirement that a prisoner obtain a certificate of probable cause in order to appeal. Act of March 10, 1908, ch. 76, 35 Stat. 40; *see* H.R. Rep. No. 23, 60th Cong. 1st Sess., 1-2 (1908); 42 Cong. Rec. 608-09 (1908).[13] The statute provided no guidance on the proper standard for the issuance of a probable cause certificate, but the certificate requirement was designed to reduce the volume of meritless appeals as such, rather than to limit the ability of a habeas corpus petitioner to raise particular issues on appeal.[14] The federal cases applying the standard referred to the substantial or insubstantial character of the issues presented, without distinguishing between procedural issues and the underlying substantive claims. *See House v. Mayo*, 324 U.S. 42, 46 (1945) (per curiam).

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[13] Placing a judicial gloss even on the plain language of the certificate statute began at its inception. The 1908 statute required a certificate of probable cause for appeal, without confining the requirement to the petitioner. Despite the plain language of the statute, most courts applied the requirement only to the petitioner. *E.g.*, *United States ex rel. Tillery v. Cavell*, 294 F.2d 12, 14-15 (3d Cir. 1961); *cf. United States ex rel. Carrol v. LaVallee*, 342 F.2d 641, 642 (2d Cir. 1965) (per curiam).

[14] The major sponsor of the legislation referred not only to habeas appeals where the underlying claims lacked merit, but also to appeals in which procedural issues predominated. 42 Cong. Rec. 608-09 (1908) (Rep. Littlefield) (citing ability of petitioner to "suggest frivolous or fictitious federal question" but also citing problem that "if a man has been there once [in federal habeas proceedings], he can go right back, and right over the same case.")

This Court's decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983), reflects this history, describing the standard of probable cause as "a substantial showing of a denial of [a] federal right," and in turn describing that standard as requiring a "*question* of some substance," and "*issues* debatable among jurists of reason." *Id.* at 893 and n.4 (citations omitted; emphasis supplied). This Court made no distinction between the underlying substantive claims and procedural issues which might impede their consideration: One of the cases cited in *Barefoot*, *Gordon v. Willis*, 516 F.Supp. 911, 912 n.2 (N.D.Ga. 1980), held that the question of exhaustion could be a "substantial" issue. In light of the history of the language used in judicial decisions to describe the certificate requirement, which is the background of Congress' adoption of the AEDPA provision, it is at least ambiguous whether Congress intended to use the term "constitutional right" to refer only to the underlying substantive claim at issue.[15]

B. The Changes In The Statutory Language Effectuated By AEDPA Do Not Evince Any Intent By Congress To Abandon The Well-Established Practice Of Considering Procedural Appeals In Habeas Corpus Cases Or The Well-Established *Barefoot* Rule

The current § 2253 was adopted by Congress as Section 102 of AEDPA. There is not a hint in the legislative history of the statute that Congress intended to abandon the *Barefoot* standard.

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[15] The *Barefoot* "denial of a federal right" formulation is at best a clumsy way to describe a requirement for reviewing purely procedural questions. If a district court arguably errs in ruling that state remedies are "available" and thus must be exhausted, it is difficult to identify what "federal right" is denied to petitioner. Nonetheless, the *Barefoot* standard has always been understood to allow review of threshold procedural questions overlying the question of whether a substantive right has been denied, and the corresponding AEDPA provision, which codifies *Barefoot*, should be interpreted the same way.

Early versions of AEDPA used the exact language of *Barefoot*.[16] On March 24, 1995, a predecessor of the current version of § 2253 – which phrased the certificate of appealability requirement as a "substantial showing of the denial of a constitutional right" – was introduced as S. 623 on the Senate floor by Senators Hatch and Specter. 141 Cong. Rec. S4585-01 at S4593 (March 24, 1995). On March 28, 1995, the California Attorney General and the Colorado Attorney General gave statements to the Senate Judiciary Committee in support of habeas reform, and both took the position that the proposed changes to § 2253 would codify existing law.[17] This language then was included in the final statute without any other discussion and the Joint Conference report explaining the various provisions of the statute makes no mention of the changes to § 2253. H.R. Conf. Rep. No. 104-518, Anti-Terrorism and Effective Death Penalty Act of 1996, Joint Explanatory Statement of the Committee of Conference, Title

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[16] *See* H.R. 729, 104th Cong., § 102 (January 30, 1995); H.R. 2992, 104th Cong. § 502 (February 29, 1996) ("federal right"). Other versions indiscriminately used the terms "federal constitutional right," S. 3, 104th Cong. § 902 (January 30, 1995) or "constitutional right." H.R. 2768, 104th Cong. § 902 (December 13, 1995).

[17] Statement of Daniel E. Lungren Concerning Habeas Corpus Reform, Committee on Judiciary, United States Senate, 1995 WL 146423 (March 28, 1995); Testimony of Gale A. Norton Before the Committee on the Judiciary, United States Senate, 1995 WL 143184 (March 28, 1995) (discussing revised Senate version of S. 3 and H.R. 729 and arguing that "[t]he addition of the *Barefoot v. Estelle* standard to the appeal section of the habeas statute – 28 U.S.C. § 2253 – is an important codification of existing case law"); *see also* Statement of Daniel E.Lungren Concerning H.R. 3 and Habeas Corpus Reform, United States House of Representatives, Judiciary Committee, 1995 WL 18450 (January 19, 1995) (same position on bill using "federal right" language). One of the senators who sponsored the original Senate version of the habeas corpus legislation praised then-Attorney General Lungren for having "played a prominent role in the drafting of the habeas corpus reform provisions." 141 Cong. Rec. S53-01 *S76 (January 4, 1995) (Senator Dole).

l Habeas Corpus Reform (April 15, 1996). There is accordingly no indication of any intent by Congress to make a substantial change in the standard for pursuing an appeal in habeas cases or to eliminate all appeals by petitioners on procedural issues. Nor is there any evidence of Congressional intent to limit the scope of habeas corpus only to "constitutional" issues: AEDPA does not alter the federal courts' habeas jurisdiction over "violation[s] of the Constitution or laws or treaties of the United States." *See* 28 U.S.C. § 2254(a).

Even the most vocal proponents of habeas reform expressly represented to the United States Senate – after the Senate had already made the change in the language of the pending legislation from "federal" to "constitutional" – that the amended law would merely "codify" this Court's decision in *Barefoot*. It is thus inconceivable that Congress intended a momentous shift in habeas practice – the most radical alteration in appellate jurisdiction over habeas proceedings since 1868 – which amici ask this Court to invent. If Congress intended to eliminate all possibility of appeal of procedural errors which prejudice a habeas petitioner, it would have said so explicitly, as it did when it prohibited review on rehearing or certiorari of decisions of courts of appeals on motions for leave to file successive petitions. 28 U.S.C. § 2244(b)(3)(E); *see also* Act of March 27, 1868, ch. 34, 15 Stat. 44 (explicit elimination of Supreme Court jurisdiction to review habeas proceedings), repealed, Act of March 3, 1885, ch. 353, 23 Stat. 437. As the *Hohn* court said: "we think a Congress concerned enough to bar our jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention." *Hohn*, 118 S.Ct. at 1977 (citations omitted); *accord*, *Jones v. United States*, 119 S.Ct. 1215, 1220 (1999) ("fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so").

The most likely explanation for the use of the term "constitutional" in § 2253 is simply inconsistent drafting.

AEDPA "is not a silk purse of the art of statutory drafting." *Lindh*, 117 S.Ct. at 2068. It uses the terms "federal," "constitutional," "rights," and "claims" indiscriminately, at times referring to violations of all types of "Federal right[s]" or all types of "claim[s]" cognizable in habeas corpus, but at other times referring only to "violation[s] of the Constitution or laws [but not treaties] of the United States" or only to violations of "constitutional right[s]" or to "constitutional error."[18] The inexplicable discrepancies among these provisions, and between them and the unamended jurisdictional provisions of the habeas statutes, preclude this Court from attaching profound consequences to inconsistencies in language which do not imply rational differences in treatment. *See Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, 1621 (1998) (congressional language would not have intended to eviscerate previous exhaustion practice by adopting a "far-reaching and seemingly perverse" new practice).

For example, the opt-in provisions, which are designed to be the most restrictive ones, *see Lindh*, 521 U.S. at 327, require imposition of a stay of execution throughout the collateral proceedings – a major intrusion upon state sovereignty – if the petitioner shows the "denial of a *federal* right." 28 U.S.C. § 2262(b)(2) (emphasis supplied); *see also* § 2254(d)(1) (granting relief allowed where state decision contrary to "Federal law"). Allowing such a stay under the plain terms of § 2262 during the pendency of federal appellate proceedings would be incoherent if a petitioner cannot appeal at all unless he shows "denial of a constitutional right." 28 U.S.C. § 2253(c). The only explanation for this inexplicable inconsistency is drafting error, not Congressional intent.[19]

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[18] These provisions are noted in the appendix to this brief. See note 8, above.

[19] Similarly, there is no rational explanation why the statute of limitations in non-opt-in habeas corpus cases begins to run upon this Court's recognition of a new and retroactive "constitutional right," § 2244(d)(1)(C), and procedural defaults in the state courts bar evidentiary

The long-standing jurisdictional provisions in the habeas corpus statute are often loosely described as creating a remedy for "constitutional violations."[20] – "violation[s] of the Constitution or laws or treaties of the United States" – It would harmonize the various provisions in the statutory scheme to treat AEDPA's references to "constitutional" error as serving the same shorthand function.

C. Every Lower Court Has Agreed That The Statutory Changes Made By AEDPA, Construed In Historical Context, Cannot Reasonably Be Read As Depriving The Federal Appellate Courts of Jurisdiction To Consider Procedural Issues Presented By Petitioners In Habeas Corpus Cases

The lower courts unanimously agree that the statutory changes made by AEDPA cannot be read to deprive the federal appellate courts of jurisdiction to consider procedural issues presented by petitioners in habeas corpus cases. Most of the lower appellate courts have adopted the construction of the statute urged by Mr. Slack here, holding that "notwithstanding a marginal variance in the language identifying the necessary showing with respect to certificates of probable cause and appealability, we conclude that the standard governing certificates of probable cause and appealability is materially identical." *Hardwick v. Singletary*, 126 F.3d 1312, 1313 (11th Cir. 1997).[21] This Court should adopt the same rule, holding that the amendments to § 2253 codify the substantive standard for pursuing an appeal in a habeas corpus action articulated in *Barefoot v. Estelle*.

But even if the Court holds that the use of the term "constitutional" has changed the substantive standard for appeal, despite the absence of any evidence that Congress intended to do so, it should interpret the scope of the change in a reasonable fashion and not in the radical manner proposed by amici. This Court should hold that Congress' use of the term "constitutional" at most limits the types of substantive claims eligible for federal appellate review,[22] but does not alter the power of the federal appellate courts to resolve threshold procedural issues. This is the result that every lower court to consider the issue has reached.[23] Petitioner submits that the proper analysis is found in *Morris v. Horn*, 187 F.3d 333, 340 (3d Cir. 1999). There, the Third Circuit rejected the argument raised by the Commonwealth of Pennsylvania that the lower court's procedural ruling in a habeas corpus case was not appealable because it had not deprived the petitioner of any constitutional rights:

> In effect, the Commonwealth's approach would preclude appellate review of all procedural issues relating to federal habeas corpus. The district courts would be left to themselves to develop the law relating to AEDPA's statute of limitations, the

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hearings in non-opt-in cases except upon the Court's recognition of "a new [and retroactive] rule of constitutional law," § 2254(e)(2)(A)(i), but the statute of limitations in § 2255 cases begins to run upon the Court's recognition of any new and retroactive "right," § 2255(3), and procedural defaults in opt-in cases are excused by this Court's "recognition of a new *Federal* right." § 2264(a)(2) (emphasis added).

[20] *See, e.g., Herrera v. Collins*, 506 U.S. 390, 403 (1993) (habeas corpus available to remedy "any constitutional violation").

[21] *Accord Tejeda v. Dubois*, 142 F.3d 18 (1st Cir. 1998) ("identical substantive requirements"); *Nelson v. Walker*, 121 F.3d 828, 832 n.3 (2d Cir. 1997) (same); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997) (same).

[22] *See Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997) (amendment to § 2253 changed substantive standard for obtaining permission to appeal in habeas corpus case by requiring petitioner to demonstrate that underlying claim rests on constitutional grounds).

[23] The relevant cases are listed in Appendix III. See footnote 8, above.

> exhaustion requirement, etc., potentially leading to unreviewable contradictions in the law of the circuit of the erroneous denial of relief to a petitioner under sentence of death. We do not accept the proposition that appellate review is unavailable on these issues.
>
> A well-reasoned rule has been set forth in a series of cases from the Fifth Circuit. [Citations.] Under this approach, a certificate is granted only if the petitioner makes (1) a credible showing that the district court's procedural ruling was incorrect; and (2) a substantial showing that the underlying habeas petition alleges a deprivation of constitutional rights. At oral argument, the Commonwealth conceded the merit of the Fifth Circuit standard.

Morris, 187 F.3d at 340.[24] Where the district court ruling rests entirely on erroneous procedural grounds, "the prudent course [is] to grant the certificate of appealability and take jurisdiction, and then remand to the district court for further proceedings." *Id.* at 341.

The courts of appeals are in agreement that they may continue to review procedural issues in habeas corpus cases, under the amendments to § 2253. Amici, by contrast, cite no case, and nothing in the legislative history, remotely suggesting that AEDPA was intended to abolish appellate review of errors relating to exhaustion, procedural default, discovery, or any of the numerous procedural issues which may arise in the course of resolving the underlying substantive claims. Amici also cite no policy in favor of leaving the district courts entirely without guidance or appellate supervision on these

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[24] Despite Pennsylvania's acknowledgement before the Third Circuit that the argument advanced in *Morris* was baseless (by its concession of the "merit of the Fifth Circuit rule"), Pennsylvania has nonetheless advanced the same baseless argument here by joining the state attorney general amici brief.

issues.[25] When Congress wanted to eliminate review of procedural issues in AEDPA, it did so explicitly, and in a way that precluded review by either party. 28 U.S.C. § 2244(b)(3)(E) (prohibiting review on rehearing or certiorari of court of appeals' screening decision to allow a second habeas petition to be filed); *see Hohn v. United States*, 118 S.Ct. at 1976. This Court cannot conclude that Congress intended to make the radical change in habeas procedure posited by amici, which is far broader than the limitation imposed by § 2244(b)(3)(E), without making the limitation explicitly, "in terms," *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868), as Congress did in 1868.

If there were any doubt about the matter, however, the interpretation of AEDPA proposed by amici must also be rejected because it would render the statute unconstitutional. Removing jurisdiction to review procedural errors by the district court, which in turn would destroy the availability of habeas relief on meritorious substantive claims, would violate the anti-suspension clause of the Constitution. U.S. Const. Art. II § 9. Such a system is entirely unlike the restrictions imposed by AEDPA on review by either party of motions to

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[25] Adoption of the position proposed by amici would call into question the validity of important procedural decisions of this Court. In *Calderon v. Ashmus*, 523 U.S. 740, 118 S.Ct. 1694 (1998), this Court concluded that a declaratory judgment action to determine whether a state satisfied the "opt-in" standards of AEDPA was premature, in part on the theory that the question of compliance with the "opt-in" standards could be litigated in the habeas proceeding. 118 S.Ct. at 1699. If amici's view is adopted, the decision in *Ashmus* would have to be reconsidered, since that procedural issue could not be reviewed on appeal in federal court at the instance of a petitioner. Likewise, in *Breard v. Greene*, 523 U.S. 371, 118 S.Ct. 1352, 1355 (1998), this court addressed procedural default issues and *Teague* issues raised by a petitioner, which, under amici's theory, it did not have jurisdiction to review. Again, if Congress had actually intended to leave this Court powerless to review procedural errors made by the district court which disfavor a petitioner, some less cryptic method of indicating its intention would be necessary.

file successive habeas proceedings, which this Court found to be within the "evolutionary" development of the abuse of the writ doctrine in *Felker v. Turpin*, 518 U.S. at 664. Further, under AEDPA, the state respondents in a habeas case do not have to obtain a certificate in order to appeal, but the petitioner must obtain one. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). If, as amici argue, a certificate cannot be issued to review procedural errors committed by a district court, then one party, the state, can obtain review as a matter of right of all procedural errors which disfavor it, but the petitioner could never obtain such review. Such a scheme of entirely one-sided review would violate the equal protection and due process clauses of the Fifth and Fourteenth Amendments. *E.g.*, *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *see M.L.B. v. S.L.J.*, 519 U.S. 102, 126-127 (1996); *Douglas v. California*, 372 U.S. 353 (1963). It would also constitute a legislative attempt to manipulate judicial outcomes, which has been recognized as impermissible for over a century. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *see United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980). This Court must reject amici's interpretation of AEDPA, since it calls into question the constitutionality of the statute, and a reasonable alternative construction of § 2253 is available.

VI. Conclusion

AEDPA does not control any portion of this case. Even if it did, the new Act does not prevent this Court from addressing the procedural issue presented by Mr. Slack's case, and Mr. Slack has not filed a "second or successive" application for habeas corpus under either the pre-AEDPA law (which properly applies to his case) or under AEDPA. This Court should accordingly vacate the order of the court of appeals denying the certificate of probable cause, and remand the case for further proceedings.

DATED this 15th day of December, 1999.

Respectfully submitted,

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Appendix of Pertinent Authorities

I. *Court of Appeals Cases Holding AEDPA Inapplicable to Cases Filed Before Its Enactment, Regardless of Date of Filing of Notice of Appeal*

1ST CIRCUIT: *Tejeda v. Dubois*, 142 F.3d 18, 22 n.4 (1st Cir. 1998).

2nd CIRCUIT: *Torres v. United States*, 140 F.3d 392, 400 n.6 (2d Cir. 1998); *Tankleff v. Senkowski*, 135 F.3d 235, 241 (2d Cir. 1998); *Nelson v. Walker*, 121 F.3d 828, 833 (2d. Cir. 1997) (critical question is whether petitioner "filed his petition prior to the effective date of the" new Act.)

3rd CIRCUIT *United States v. Skandier*, 125 F.3d 178, 180-81 (3d Cir. 1997).

5TH CIRCUIT *Boyd v. Johnson*, 167 F.3d 907, 909 n.3 (5th Cir. 1999); *Lara v. Johnson*, 141 F.3d 239, 241 n.1 (5th Cir. 1998); *Neal v. Cain*, 141 F.3d 207, 209-10 (5th Cir. 1998); *Moody v. Johnson*, 139 F.3d 477, 480 n.1 (5th Cir. 1998); *United States v. Ramos-Rodriguez*, 136 F.3d 465, 466-67 (5th Cir. 1998); *Cannon v. Johnson*, 134 F.3d 683, 685 (5th Cir. 1998); *United States v. Cervantes*, 132 F.3d 1106, 1108 n.1 (5th Cir. 1998); *Lucas v. Johnson*, 132 F.3d 1069, 1072-73 (5th Cir. 1998); *Muniz v. Johnson*, 132 F.3d 214, 218 (5th Cir.), *cert. denied*, 118 S. Ct. 1793 (1998); *Carter v. Johnson*, 131 F.3d 452, 457-458 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1567 (1998);

United States v. Roberts, 118 F.3d 1071, 1072 (5th Cir. 1997); *United States v. Carter*, 117 F.3d 262, 264 n.1 (5th Cir. 1997); *Green v. Johnson*, 116 F.3d 1115, 1119-20 (5th Cir. 1997).

6TH CIRCUIT — *Norris v. Schotten*, 146 F.3d 314, 322, 322-23 (6th Cir. 1998); *Arredondo v. United States*, 120 F.3d 639, 640 & n.1 (6th Cir. 1997).

7th CIRCUIT — Broad language in Seventh Circuit opinions strongly suggests that none of the provisions of AEDPA apply to any case filed before April 24, 1996, regardless of the particular stage of the case. *See Reddick v. Haws*, 120 F.3d 714, 715 n.1 (7th Cir. 1997) ("Reddick's petition was filed before the AEDPA became law. The provisions of this act therefore do not govern our review of his claims."); *Johnson v. Washington*, 119 F.3d 513, 521 n.5 (7th Cir. 1997) ("We are aware that the United States Supreme Court has recently decided that the new provisions of Chapter 153 . . . are not applied retroactively to pending cases").

9th CIRCUIT — *Fuller v. Roe*, ___ F.3d ___, 1999 WL 734870 (9th Cir. 1999) ("We determine that the holdings of the majority of the circuits are better reasoned. As a result, we conclude that the date of Fuller's Petition for a Writ of Habeas Corpus is the

determinative date from which to judge the applicability of AEDPA."); *Naddi v. Hill*, 106 F.3d 275, 276-77 (9th Cir. 1997).

10TH CIRCUIT — *Aragon v. Shanks*, 144 F.3d 690, 691 n.1 (10th Cir. 1998); *Sellers v. Ward*, 135 F.3d 1333, 1336 (10th Cir. 1998); *Lucero v. Kerby*, 133 F.3d 1299, 1303 n.1 (10th Cir. 1998), *cert. denied*, 118 S.Ct. 1375 (1998); *United States v. Kunzman*, 125 F.3d 1363, 1364 n.2 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1375 (1998).

11th CIRCUIT — *Hardwick v. Singletary*, 122 F.3d 935, 936 (11th Cir. 1997).

D.C. CIRCUIT — *Crowell v. Walsh*, 151 F.3d 1050, 1051-52 (D.C. Cir. 1998).

II. *Uses of "Federal," "Constitutional" and "Right" in AEDPA Amendments.*

1. "Federal" Right or Claim.

28 U.S.C. § 2262(b)(3) (opt-in stay of execution available upon "substantial showing of the denial of a *Federal* right" (emphasis added))

28 U.S.C. § 2265(a)(1) (exception to opt-in procedural default rule upon "recognition of a new *Federal* right" (emphasis added))

28 U.S.C. § 2244(d)(1)(D) (running of non-opt-in statute of limitations postponed when "factual predicate for the *claim* . . . could not have been discovered through the exercise of due diligence" (emphasis added))

28 U.S.C. § 2254 (d)(1) review of claims previously adjudicated on merits in state court for

"decision that was contrary to, or involved an unreasonable application of, clearly established *Federal law* as determined by the Supreme Court" (emphasis added))

28 U.S.C. § 2253(c) (running of § 2255 statute of limitations delayed by assertion of "right" only recently recognized by Supreme Court and made retroactive to cases on collateral review)

28 U.S.C. § 2255(4) (§ 2255 provision, otherwise identical to § 2244(d)(1)(D))

28 U.S.C. § 2264(a)(3) (exception to opt-in procedural default rule on same basis as § 2244(d)(1)(D))

2. "Constitution or Laws"

28 U.S.C. § 2244(d)(1)(B) (non-opt-in statute of limitations does not run while petitioner was impeded in seeking habeas corpus relief "by State action in violation of the Constitution *or laws* of the United States" (emphasis added))

28 U.S.C. § 2255(2) (same rule for § 2255 statute of limitations);

28 U.S.C. § 2264(a)(1) (exception to opt-in procedural default rule where failure to raise claim results from "State action in violation of the constitution *or laws* of the United States" (emphasis added)).

3. "Constitutional"

28 U.S.C. § 2244(b)(2)(A) (successive petition permitted if it asserts violation of "new rule of constitutional law, made retroactive to cases on collateral review")

28 U.S.C. § 2244(b)(2)(B)(ii) (successive petition permitted if "facts underlying the claim- . . . establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty")

28 U.S.C. § 2244(d)(1)(C) (running of statute of limitations postponed until "date on which [new] constitutional right was initially recognized.")

28 U.S.C. § 2253(c)(2) (right to appeal denial of habeas corpus or § 2255 motion only upon "substantial showing of the denial of a constitutional right")

28 U.S.C. § 2254(e)(2)(A)(i) (evidentiary hearing on facts defaulted in state court under circumstances described in § 2244(b)(2)(A))

28 U.S.C. § 2254(e)(2)(B) (evidentiary hearing on facts defaulted in state court under circumstances described in § 2244(b)(2)(B)(ii))

III. *Cases Holding 28 U.S.C. § 2253(c) Does Not Bar Review of Procedural Issues.*

1ST CIRCUIT: *Gaskins v. Duval*, 183 F.3d 8, 9 (1st Cir. 1999) ("this court has power to consider such preliminary procedural rulings where they are predicates to consideration of a constitutional issue")

2ND CIRCUIT: *Soto v. United States*, 185 F.3d 48 (2d Cir. 1999) (holding that Supreme Court's decision in *Peguero v. United States*, 526 U.S. 23 (1999) rejected argument sub silentio; although

government's brief urged no jurisdiction because violation not constitutional but rather a criminal rules violation, Court considered issue and reached the merits)

5TH CIRCUIT: *Sonnier v. Johnson*, 161 F.3d 941 (5th Cir. 1998) (to appeal on a procedural ruling, applicant must make a credible showing that the district court's procedural ruling was wrong; if he does so court of appeals will remand to district court for consideration of the merits in the first instance); *Whitehead v. Johnson*, 157 F.3d 384 (5th Cir. 1998) (same; procedural appeals allowed where petitioner makes credible showing that lower court procedural ruling was wrong; court of appeals will not address merits if lower court has not done so); *Trevino v. Johnson*, 168 F.3d 173, 176-177 (5th Cir.), *cert. denied*, 120 S.Ct. 22 (1999) (court of appeals reviewed whether district judge abused discretion in declining to recuse himself because, although a certificate of appealability was required to review the merits of the substantive claims, none needed to address procedural issues which arose in district court proceedings)

8TH CIRCUIT: *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999) ("Though 28 U.S.C. § 2253(c) provides that a certificate

may only be granted upon a substantial showing of a deprivation of a constitutional right, that does not preclude review of preliminary procedural issues, such as . . . [a] limitations question"[citation]); *Nichols v. Bowersox*, 172 F.3d 1068, 1069 n. 2 (8th Cir. 1999) (en banc) ("Upon careful consideration, we conclude that § 2253(c) does not preclude us from exercising jurisdiction in this case. We do not think that § 2253(c) is intended to preclude all review of preliminary procedural issues, such as the limitations question now before us. We read § 2253(c) as addressing only the sort of showing required for a petitioner to obtain appellate review of the merits of his or her claims for habeas corpus or § 2255 relief. Otherwise, a final order entered by a district court based upon a question antecedent to the merits, if adverse to the petitioner, could never be reviewed on appeal. While we assume that Congress has the power to establish such a regime, we do not think it intended to do so when it enacted AEDPA.")

Jan 12 2000

No. 98-6322

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTONIO TONTON SLACK,

Petitioner,

v.

E. K. McDANIEL, Warden, Ely (Nevada) State Prison, and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR RESPONDENTS

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NO. 98-6322

In The
Supreme Court Of The United States

ANTONIO TONTON SLACK,
Petitioner,

v.

E. K. McDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL REPLY BRIEF FOR RESPONDENTS

I. ARGUMENT

A. Respondents have not waived the right to rely on the AEDPA.

In his supplemental brief Petitioner Antonio Slack (hereinafter Slack) argues that Respondents have waived any right to rely on the AEDPA because they never raised the applicability of

the AEDPA. However 28 U.S.C. §2244(b) and §2253(c) are jurisdictional and cannot be waived. Congressional statutes granting or withdrawing jurisdiction generally "speak to the power of the court rather than the rights or obligations of the parties." *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994). Sections 2244(b) and 2253(c) share characteristics common among jurisdictional statutes. Their commands are addressed to the power of the federal courts, rather than the rights and obligations of the parties. These sections constitute a limitation on the Article III habeas corpus jurisdiction of the federal courts. "Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 443, 460 (1953). Since these provisions are jurisdictional they cannot be waived by the parties. *See e.g., Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *California v. LaRue*, 409 U.S. 109, 112 n.3 (1972).[1]

[1] Respondents would note that, while they never affirmatively argued below that the AEDPA applied to this case, Slack did. In his motion for reconsideration of the district court's order finding he had abused the writ Slack argued that the AEDPA had superceded Rule 9(b). JA 145-150. Slack specifically stated: "This case is governed by the AEDPA because it was commenced after April 25, 1996." JA 147. Slack was obviously referring to the date he first raised the five claims that were dismissed as abusive and were first filed on December 24, 1997, since Slack initiated the current federal proceeding on May 30, 1995. JA 35, 66.

B. The provisions of 28 U.S.C. §2244(b) and 28 U.S.C. §2253(c) as amended by the AEDPA should apply to this case.

Slack argues that the questions presented in this supplemental briefing have been answered by this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997). However, as pointed out in Respondents' supplemental brief, *Lindh* simply does not apply to this case. First of all, *Lindh* involved the applicability of 28 U.S.C. §2254 to cases pending on the AEDPA's effective date. That section is not at issue in this case. All of the claims at issue in this case appeared for the first time one year and eight months after the AEDPA's effective date. Therefore, the negative inference this Court discussed in *Lindh* cannot apply to the claims at issue here. Additionally, 28 U.S.C. §2253 requires the initiation of an appeal before it can have any impact. Thus, the time when the section 2254 petition was filed is meaningless.

Slack next contends that applying the AEDPA would lead to absurd results. Slack appears to be arguing that an amended pleading cannot constitute a new case and therefore, the AEDPA cannot apply. Respondents have never argued that Slack's amended petition constituted a new case. Rather, Respondents'

position is that the new claims that appeared in that amended petition should be governed by the AEDPA.

Slack argues that Congress could not have intended this result because it included 28 U.S.C. §2266(b)(3)(B) in chapter 154 which treats amendments as second or successive petitions. According to Slack if Congress had intended chapter 153 amended petitions to be treated as second or successive it would have included a similar section in chapter 153. The negative inference Slack is attempting to establish simply has no application to this case. Respondents have never argued that the five claims at issue here were second and successive because they appeared in an amended pleading. Rather, Slack's claims are second and successive because they did not appear in his first federal proceeding in 1991. JA 6-22.

Slack next argues that an appeal cannot constitute a new case. According to Slack, if an appeal constitutes a new case then all of the provisions of the AEDPA would apply and an appellate court would be applying different law to claims than the district court that applied pre-AEDPA law. Slack misapprehends

Respondents' argument. Respondents have never argued that section 2253 applies to an appeal filed after AEDPA because an appeal constitutes a new case.[2] Section 2253 applies to post-AEDPA appeals because the action that triggers section 2253 is the filing of a notice of appeal not the filing of a section 2254 petition.

Once section 2253 has been applied and a certificate of appealability granted, the appeals court would apply the same law to the individual claims that was applied by the district court. If a claim appeared in a petition prior to April 24, 1996, then pre-AEDPA law would apply. If the claim appeared in a petition after April 24, 1996, the AEDPA would apply.

As pointed out in Respondents' supplemental brief, applying the AEDPA to claims that appeared for the first time one year and eight months after its effective date is in keeping with this Court's case law recognizing Congress' authority to limit the habeas corpus jurisdiction of federal courts. *See Calderon v.*

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2 The Solicitor General also contends that an appeal constitutes a new case and that is why section 2253 applies. The Solicitor General relies on *Hohn v. United States*, 524 U.S. 236 (1998), in support of its argument. While Respondents believe the Solicitor General's position reaches the correct result it does so for the wrong reasons. Respondents submit that the Solicitor General has read the *Hohn* decision as more expansive than it is. All the *Hohn* court said is that the filing of an application for a certificate of appealability is a sufficient "case" for purposes of judicial review under 28 U.S.C. §1254.

Thompson, 523 U.S. 538 (1998); *Felker v. Turpin*, 518 U.S. 651 (1996); *Lonchar v. Thomas*, 517 U.S. 314 (1996). It is also in keeping with the clear intent of Congress. to enact meaningful, comprehensive habeas corpus reforms.

C. Slack is not entitled to a certificate of appealability under 28 U.S.C. §2253(c).

Under pre-AEDPA law a state prisoner had to make a substantial showing of the denial of a federal right in order to obtain a certificate of probable cause to appeal. *Barefoot v. Estelle*, 463 U.S. 880 (1983). The AEDPA changed this standard to a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c). In his supplemental brief Slack argues that this change was merely the product of sloppy drafting. According to Slack there is not a hint in the legislative history of the AEDPA that Congress intended to change the *Barefoot* standard.

However, if the plain language of the statute is clear, and effect can be given to the words as written without offending the Constitution or reaching absurd results, the legislative history is a non factor in terms of applying the statute. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (statutory words should be given

their ordinary meaning.) The fact is, there is nothing ambiguous about section 2253(c). A constitutional right is a right guaranteed under the Constitution of the United States. This is clearly different from mere federal rights which are products of statutes. By changing the standard from the denial of a federal right to the denial of a constitutional right Congress was making a clear distinction between the two.

Slack also argues that precluding appeals of procedural issues is such a radical change to habeas practice that it could not have been intended by Congress. However, the position advocated by Respondents is no more radical than placing a one year statute of limitations on the right to file a section 2254 petition. Nor is it more radical than prohibiting an evidentiary hearing in federal court if the factual basis for a claim was not developed in state court. The point is, the AEDPA was intended to be a radical change in habeas corpus proceedings. Respondents' position is in keeping with Congress' intent.

The Solicitor General contends that the change from "federal" right to "constitutional" right was only intended to

preclude the appeal of federal statutory or treaty claims. The problem with this position is that these type of claims make up an extremely small category of section 2254 petitions. As the Amici States' brief points out cases involving something other than alleged violations of the Constitution are extremely rare. (Amici States' brief, pg. 10, n.4.) Congress intended the AEDPA to streamline and speed up the resolution of habeas proceedings. Merely precluding appeals on treaty issues or federal statutory claims would not have that effect. In fact, these cases are so rare that there would be virtually no effect at all.

The Solicitor General and Amicus Criminal Justice Legal Foundation argue that courts must look to the underlying claims in a petition in order to determine if a showing of the denial of a constitutional right has been made. However, the purpose of an appeal is to determine the correctness of a district court's ruling. If an appeals court looks to the underlying claims, in an appeal involving a denial on procedural grounds, it would require the court to look somewhere beyond the district court's order to determine whether the COA should issue. Under section 2253 an appeal may

only be taken from the final order in a habeas corpus proceeding. Looking beyond the district court's order to the underlying claims of the petitions reads language into section 2253 that simply does not exist. In addition, requiring appeals courts to conduct its own analysis of the merits of a petitioner's underlying claims, when no such analysis was done in district court, is contrary to the intent of Congress to streamline the habeas process.

Section 2253(c) is clear and unambiguous. In order to obtain a certificate of appealability a petitioner must make a substantial showing of the denial of a constitutional right. The right to a section 2254 petition is statutory, not constitutional. The procedural requirements for obtaining a merits review of a section 2254 petition are also statutory. Dismissal of a petition based on procedural rules does not implicate constitutional rights. Therefore, a petitioner will not be able to make a substantial showing of the denial of a constitutional right in order to appeal a district court order based on procedural grounds. Slack is not entitled to a certificate of appealability.

II. CONCLUSION

The provisions of 28 U.S.C. §2244(b) and 28 U.S.C. §2253(c) should be applied to Slack's petition. Slack is unable to meet the requirements of 28 U.S.C. 2253(c) and his appeal should be dismissed.

Dated: January, 2000.

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I. INTRODUCTION

Petitioner Slack demonstrated in his supplemental brief that the Anti-Terrorism and Effective Death Penalty Act of 1996 does not apply to the appellate proceedings in this case. Even if it did, AEDPA does not alter the power of the federal appellate courts to address procedural errors which bar review of substantive claims. This Court accordingly has jurisdiction to review the erroneous decision of the district court applying the abuse of the writ doctrine, when Mr. Slack's previous petition had been dismissed without prejudice for exhaustion, without any federal adjudication. The state respondents' supplemental brief and the briefs filed by the amici curiae do not refute Mr. Slack's arguments.

II. ANY ARGUMENT BASED ON THE APPLICATION OF AEDPA OF THIS CASE HAS BEEN WAIVED BY RESPONDENTS

Following the injection of the issue of the application of AEDPA to this case by the attorney general amici, petitioner Slack noted that any such issue had been waived by the failure of respondents to raise it at any point in the proceedings. Pet. Reply Br. at 16-17. The supplemental briefs submitted by the respondents and the amici curiae do not address the issue of the state's forfeiture of any right to rely on the provisions of AEDPA, as a result of its failure to invoke the statute at any point before oral argument in this Court and of its affirmative assertion in its principal brief in this court that AEDPA does not apply to this case. The failure of the respondents to address this issue should be taken as a concession that, if this court applies the same procedural rules to respondents that it applies against habeas corpus petitioners, any issue as to the application of AEDPA which does not implicate the subject matter jurisdiction of this Court has been waived. *See* Pet. Supp. Br. at 3-5.

III. ADEPA'S AMENDMENTS TO CHAPTER 153, INCLUDING THE AMENDMENTS TO 28 U.S.C. §§ 2253 AND 2244(b), DO NOT GOVERN THE APPELLATE PROCEEDINGS IN MR. SLACK'S CASE, WHICH WAS COMMENCED BEFORE APRIL 24, 1996

The AEDPA amendments to Chapter 153, including the appeal and successor petition provisions, do not govern the appellate proceedings in this case. In *Lindh v. Murphy*, 521 U.S. 320 (1997), this Court held that the Chapter 153 provisions of the Act do not apply to "cases pending" before its enactment, based on the contrast with the explicit Congressional command to apply the Chapter 154 provisions to "cases pending" at the time the Act took effect. This case was pending in the district court at the time AEDPA was enacted.

Amicus Criminal Justice Legal Foundation argues that *Lindh* was wrongly decided and that its holding should not be applied to any other provisions of Chapter 153. The primary authority on which Criminal Justice Legal Foundation relies, however, is *Martin v. Hadix*, 119 S.Ct. 1998 (1999), in which this Court approved of the analysis of *Lindh*, based on the clear negative inference showing the Congressional intent to apply only the provisions of Chapter 154 to cases pending at the time of its enactment. *Id.* at 2005; *see id.* at 2008 (Scalia, J., concurring in part and in judgment); *id.* at 2011 (Ginsburg, J., dissenting). *Martin* thus forms no basis for an argument that AEDPA applies to this case despite the holding in *Lindh* that the Chapter 153 amendments of AEDPA do not apply to cases pending at the time of its enactment. Further, Congress has had ample time to amend the statute if it disapproved of the interpretation of AEDPA adopted in *Lindh*, and it has not done so. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 384 (1982).

The state respondents argue that the post-AEDPA amendment to Mr. Slack's petition in the district court commences a new "case" to which AEDPA applies. Resp. Supp. Br. at 9. Respondents cite no legal authority in support of this proposition. There is no authority suggesting that the amendment of a pleading in a pending case begins a new case, and such a position is refuted by 28 U.S.C. § 2242, which provides that the rules generally applicable to

amendments of pleadings in civil cases apply to habeas proceedings. The brief of the United States as amicus curiae thoroughly refutes the respondents' argument, by demonstrating that their position is inconsistent with the ordinary use of the word "case" adopted in other decisions of this Court;[1] it is inconsistent with Congress's use of the words "cases" and "claim" in other provisions of AEDPA;[2] and it is inconsistent with traditional habeas practice.[3] *See*

---

[1] *Hohn v. United States*, 524 U.S. 236, 241 (1998) ("a proceeding seeking relief for an immediate and redressable injury"); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("a proceeding in court, a suit, or action.")

[2] *See, e.g.*, 28 U.S.C. §§ 2244(b) and (d)(1); 28 U.S.C. §§ 2254(d) and (e)(2); 28 U.S.C. § 2255; 28 U.S.C. §§ 2261(a), (d) and (e); 28 U.S.C. § 2262(c); 28 U.S.C. § 2264; 28 U.S.C. §§ 2265(b) and (c); 28 U.S.C. § 2266(b)(1). When Congress used "case" in other provisions of AEDPA, it employed that word in its ordinary sense, to refer to a judicial proceeding or action. *See, e.g.*, 28 U.S.C. 2244(b)(2)(A) ("a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"); 28 U.S.C. 2261(e) ("a capital case"); 28 U.S.C. 2262(c) ("no Federal court thereafter shall have the authority to enter a stay of execution in the case"); 28 U.S.C. § 2262(b)(1)(B) (if necessary, district court shall afford a hearing before "submission of the case for decision"). Congress used the word "claim" to refer to a legal basis for relief within a "case." *See, e.g.*, 28 U.S.C. §§ 2244(b)(1) and (2) ("[a] claim represented in a second or successive habeas corpus application"); 28 U.S.C. § 2254(e)(2) (if applicant "failed to develop the factual basis of a claim in State court proceedings," court shall not hold an evidentiary hearing unless specified conditions are met). Because Congress clearly differentiated throughout AEDPA between "case" and "claim" in this manner, if Congress had meant AEDPA's application to turn on whether a particular claim was pending on enactment rather than on whether the habeas proceeding was pending, Congress presumably would have used "claim" rather than "case" in Section 107(c)'s timing provision. The use of the term "case" clearly indicates Congress' intent to have the Chapter 153 amendments apply only to "cases" that were pending on the date of AEDPA's enactment, not merely to "claims."

[3] The Solicitor General recognizes that courts have not viewed amendments to pending pre-adjudication habeas petitions as new cases

U.S. Br. at 15-18. Respondents' argument on this point must be rejected.[4]

Respondents also claim that *Hohn v. United States*, 118 S.Ct. 1969 (1998), limited *Lindh* sub silento by applying AEDPA to a pending case when the notice of appeal was filed after its enactment. Resp. Supp. Br. at 7-8. Respondents do not address the fact that the petitioner in *Hohn* sought certiorari on the question of whether the Eighth Circuit erred by applying the amended § 2253 to his case, and this Court denied certiorari on the question, although it granted certiorari on other issues. *See Hohn v. United States*, 99 F.3d 892, 893 (8th Cir. 1996) (per curiam), *cert. granted in part and denied in part*, 118 S.Ct. 361 (1997). This Court's assumption that AEDPA applied in the appeal, *see Hohn v. United States*, 118 S.Ct. at 1872, is only a recognition that the denial of certiorari rendered the Eighth Circuit's ruling on that particular issue final without implying any validation of the ruling by the Court. *See Brown v. Allen*, 344 U.S. 443, 488-97 (1953).

Respondents also do not discuss the post-*Hohn* decision in *United States v. Dickey*, 118 S.Ct. 2365 (1998), in which this Court granted certiorari, vacated a lower court decision applying the AEDPA amendment to § 2253 in a § 2255 case in which the appeal

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subject to the limitations on second or successive petitions, but instead have permitted amendments under Federal Rule of Civil Procedure 15. *See Johnson v. United States*, 196 F.3d 802, 804 (7th Cir. 1999); *see also Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring). Congress also treated amendments as part of the overall habeas "case" when it subjected only amendments in capital cases governed by the new Chapter 154 provisions to AEDPA's limitations on second or successive petitions. *See* 28 U.S.C. § 2266(b)(3)(B). This is another reason why the state respondents' focus on individual claims cannot be correct.

[4] Notably, the state does not acknowledge that application of AEDPA to the question originally presented in this case would mean that petitioner would prevail. As petitioner pointed out in his principal brief, every decision, including this Court's decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), holds that the dismissal of a petition without prejudice for exhaustion does not make a subsequent petition "second or successive" under AEDPA. Pet. Br. at 33-36.

was filed after the adoption of AEDPA, and remanded for reconsideration in light of *Lindh*. The GVR order in *Dickey* makes sense only as an acknowledgment that § 2253 does not apply to any case commenced before AEDPA's enactment, even if the appellate proceedings begin afterward.[5] This position has been followed by virtually every court of appeals. *See* Pet. Supp. Br. at 7-10 & n.8. In short, *Hohn* did not resolve this issue, but, in combination, *Lindh* and *Dickey* do.

The filing of the request for a certificate of probable cause after AEDPA does not start a new "case" for the purposes of applying AEDPA. The Solicitor General does not discuss the authorities holding that a "case," once begun, continues throughout the appellate proceedings. Pet. Supp. Br. at 6; *see also Calderon v. Thompson*, 118 S.Ct. 1489, 1502 (1998) (treating post-AEDPA recall of mandate as part of pre-AEDPA case); *cf.* U.S. Br. at 10 (citing dictionary definition of action as "pending from its inception until the rendition of final judgment."). An application for a certificate of probable cause (or certificate of appealability) is the means of bringing the "case" from the district court to the Court of Appeals, along with the notice of appeal which is necessary to invest the Court of Appeals with jurisdiction. The application to the Court of Appeals has no independent significance: granting or denying the certificate is based on the substantiality of the issues in the record of the case before the district court; and if the district court issued the certificate, there would be no doubt that the appeal is a continuation of the district court case. The fact that the application for a certificate means there is a case "in" the Court of

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[5] A GVR order, like other summary action by this Court, may have limited precedential value. *See Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (summary affirmances). Nevertheless, it is a disposition of the case by this Court, an "alternative to summary reversal," *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam); *id.* at 178 n.1 (Scalia, J., dissenting), based on this Court's determination that intervening events, such as a new decision of this Court "cast substantial doubt on the correctness of the lower court's . . . decision." *Id.* at 170; *see id.* at 176 (Rehnquist, C.J., concurring); *id.* at 191-192 (Scalia, J., dissenting) (GVR proper when intervening factor has "legal bearing upon the decision").

Appeals under this Court's decision in *Hohn* does not mean that it is a *new* case somehow different from the one before the district court.

The Solicitor General's position that a new "case" begins when the case reaches an appellate level would also produce absurd and incoherent results, because there is no rational way to limit the application of the provisions of AEDPA only to the appellate provisions: if the appeal starts a new case, as the Solicitor General suggests, all of the Chapter 153 provisions would apply, despite the holding of *Lindh* that the § 2254 amendments do not. Similarly, if a new "case" begins when the case proceeds to a new appellate court, then every case in which a petition for certiorari was granted after the enactment of AEDPA – including *Lindh* – would be subject to AEDPA. Such a result would be analytically incoherent, and it would produce significant confusion over the application of different pre- or post-AEDPA legal standards in the district courts and the courts of appeals. *See* Pet. Supp. Br. at 12-13. The Congressional intent to reform habeas corpus procedure did not seek to "foster disarray," as the United States acknowledges, U.S. Br. at 23; but disarray would be the primary result of accepting the Solicitor General's argument that the appellate provisions of AEDPA apply to this case.

IV. ASSUMING ARGUENDO THAT THE PROVISIONS OF AEDPA APPLY TO THIS CASE, A CERTIFICATE OF APPEALABILITY MAY PROPERLY ISSUE UNDER 28 U.S.C. § 2253(c) BECAUSE MR. SLACK'S CASE INVOLVES THE DENIAL OF SUBSTANTIAL CONSTITUTIONAL RIGHTS, WHICH CAN BE REVIEWED ONLY BY FIRST ADDRESSING THE THRESHOLD PROCEDURAL ISSUE RESOLVED BY THE DISTRICT COURT

Respondents argue, essentially without legal analysis, that the AEDPA amendment to 28 U.S.C. § 2253(c) abolishes any jurisdiction to review procedural errors committed by the district court in an appeal by the petitioner, because it provides that a certificate of appealability will issue upon a "substantial showing of the denial of a constitutional right." Neither respondents, nor the amici state attorneys general who first made this claim, explain how the

Congressional intent that "[h]abeas corpus reform must not discourage legitimate petitions that are clearly meritorious and deserve close scrutiny," Resp. Supp. Br. at 12, quoting 141 Cong. Rec. § 4596 (Senator Hatch), would be forwarded by precluding review to correct procedural errors which prevent meritorious claims from being addressed.[6] As the Solicitor General points out, such a scheme could only lead to confusion on procedural questions, U.S. Br. at 23, which Congress could not have intended. Petitioner showed in his supplemental brief that the use of the term "constitutional right" in § 2253(c) must be taken as a shorthand reference to violations of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The indiscriminate use of the terms "constitutional" and "federal" in the AEDPA amendments compels the conclusion that Congress did not intend to alter the existing substantive standard for certificates of probable cause under *Barefoot v. Estelle*, 463 U.S. 880 (1983). *See* Pet. Supp. Br. at 18-20, App. 3-5. Neither respondents nor amici make any attempt to analyze the irreconcilably inconsistent use of these terms in AEDPA; nor do they explain why, for instance, a petitioner in an opt-in jurisdiction would be entitled to a stay of execution throughout the proceedings on a showing of denial of a "federal right," 28

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[6] The respondents and amici rely upon general congressional statements in favor of habeas reform as a justification for interpreting all provisions of AEDPA as intended to give every habeas petitioner, in essence, the bum's rush. To the contrary, Congressional reform of habeas procedures was intended to preserve access to one full and fair round of federal habeas review: that was the basic thrust of the Powell Committee report, which stimulated calls for habeas reform. *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Committee Report and Proposal* 6, 15 (1989). In fact, Congress did not adopt one proposed provision which suggested that the courts should interpret the opt-in provisions of AEDPA in favor of speed rather than fairness. *See* H.R. 729, 104th Cong. (1995) (proposed § 2263) ("This chapter shall be construed to promote the expeditious conduct and conclusion of State and Federal court review in capital cases.") This Court has also rejected a "seemingly perverse" interpretation of AEDPA, *Stewart v. Martinez-Villareal*, 118 S.Ct. at 1621, even though the proffered interpretation would have reduced the volume of habeas litigation.

U.S.C. § 2262(b)(2), if there could be no appeal on the basis of denial of such a right under § 2253(c).[7] Reviewing the statute as a whole, *see Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993), the confusion in these provisions is evident: what is absent is any evidence of Congressional intent to change the substantive standard of *Barefoot*. *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1957) ("it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.").[8]

In this case, Mr. Slack alleged substantial constitutional claims in his amended petition. The state did not oppose issuance of a certificate of probable cause on the ground that the underlying claims were insubstantial, but only on the ground that the procedural abuse of the writ question was insubstantial. JA 186-194; *see* p. 1, above; Pet. Supp. Br. at 3-5.[9] The Solicitor General, and

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[7] The point is further demonstrated by the application of the certificate provision to proceedings under 28 U.S.C. § 2255. Motions under § 2255 are clearly proper to correct non-constitutional errors. 28 U.S.C. § 2255 ¶ 1; *see, e.g., Russell v. United States*, 507 F.2d 1029, 1032 (4th Cir. 1974). There is no evidence of any Congressional intent to bar review of substantive errors in federal sentencing by means of the amendment to § 2253(c).

[8] The language of AEDPA is not a change in previous statutory language, which might furnish some evidence of an intent to alter the meaning of an existing provision. *See McElroy v. United States*, 455 U.S. 642, 650 n. 14 (1982). Rather, Congress was apparently attempting to codify the judicial standard of *Barefoot*, which was stated in a variety of ways in *Barefoot* itself; and the legislative history indicates an intent to adhere to the standard of *Barefoot* with an additional intent only to require specification by the court of the issues which met the standard. *See* Pet. Supp. Br. at 16-20. If Congress had intended the radical change in habeas practice suggested by respondents, it is highly unlikely that no mention of it would have been made in the legislative history. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." [Footnote omitted]).

[9] Contrary to the suggestion of amici, *see* CJLF Br. at 15; U.S. Br. at 21-22, a showing of merit as to an underlying substantive claim cannot be

even amicus Criminal Justice Legal Foundation, agree that there is no indication in AEDPA of Congressional intent to take the radical step of barring all review of procedural issues at the bequest of a habeas petitioner. *See Jones v. United States*, 119 S.Ct. 1215, 1220 (1999); U.S. Br. at 22-23; CJLF Br. at 13. Mr. Slack has demonstrated that the district court erred in dismissing his amended petition under the abuse of the writ doctrine, and that is a "question of some substance" which presents "issues debatable among jurists of reason." *Barefoot*, 463 U.S. at 893 and n.4 (citations omitted). Accordingly, even if the appeal provisions of AEDPA do apply here, Mr. Slack's case is properly before this Court under the substantive standard of *Barefoot*, which AEDPA codifies.

Even assuming *arguendo* that Congress intentionally departed from *Barefoot* by using the term "constitutional" in § 2253, it would be irrational to conclude that Congress meant to eliminate procedural appeals in habeas corpus cases. If that was Congress' intent, it could and would have done so as clearly as it precluded review on certiorari of decisions granting or denying leave to file successive habeas petitions. 28 U.S.C. § 2244(b)(3)(E). Nonetheless, the state respondents and their amici assert that AEDPA accomplished this result on the theory that procedural errors involve the denial of "federal" rights and not "constitutional" rights and thus fall among the class of issues Congress supposedly meant to eliminate from appellate review. But the truth is, procedural errors do not constitute the denial of "federal rights" any more than they would constitute denial of "constitutional rights;" a ruling misapplying the exhaustion or abuse of the writ doctrines, or

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required as a condition of issuing a certificate of appealability, when procedural error has prevented the petitioner from making any such showing. Mr. Slack's petition was disposed of on a motion to dismiss, in which the allegations of the petition must be taken as true. *E.g., Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139, 2143 (1999); *United States v. Gaubert*, 499 U.S. 315, 327 (1991). The district court's error in finding the petition barred as "second or successive" prevented any litigation or evaluation of the merits of petitioner's claims. As in *Bracy v. Gramley*, 520 U.S. 899 (1997), a petitioner cannot be required to prove the underlying claim before obtaining review of the procedural error – denial of discovery in *Bracy* – which prevents him from proving the claim.

discovery rules, does not deprive a petitioner of any "federal right" or "constitutional right" unless it prevents examination of the underlying substantive claim. Thus, under respondents' analysis, *Barefoot* should not have allowed federal appellate review of procedural errors because such errors did not amount to "a substantial showing of a denial of a federal right," *Barefoot*, 463 U.S. at 893.

But *Barefoot* **did** allow appeals on "debatable" procedural issues, as respondents and amici do not dispute, and it did so because a procedural error that prevents consideration of the underlying right results in the "denial" of the underlying right itself. Thus, even if respondents and their amici were correct that Congress' use of the term "constitutional" was meant to alter the *Barefoot* standard, the most it can mean is that Congress limited the types of substantive issues susceptible to review, while permitting the federal appellate courts to address procedural issues that prevent consideration of those substantive claims. That distinction would not affect Mr. Slack's case, because the substantive claims contained in his petition rest on federal constitutional grounds.

V. CONCLUSION

AEDPA does not control any portion of this case. Even if it did, the new Act does not prevent this Court from addressing the procedural issues presented by Mr. Slack's case, and Mr. Slack has not filed a "second or successive" application for habeas corpus under either the pre-AEDPA law (which properly applies to his case) or under AEDPA. This Court should accordingly vacate the order of the Court of Appeals denying the certificate of probable cause, and remand the case for further proceedings.

DATED this 13th day of January, 2000.

Respectfully submitted,

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